TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 694741

THE RED "C" OIL MANUFACTURING COMPANY,
APPELLANT,

vs.

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, WILLIAM A. GRAHAM, H. C. GAUTIER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED DECEMBER 9, 1901.

(21,850.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 624.

THE RED "C" OIL MANUFACTURING COMPANY, APPELLANT,

vs.

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, WILLIAM A. GRAHAM, H. C. CARTER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

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1 *Transcript of Record.*

THE UNITED STATES OF AMERICA,
Eastern District of North Carolina, To wit:

At a Circuit Court of the United States for the Eastern District of North Carolina, begun and held at the court-house in the city of Raleigh, on the First Monday of September, it being the 6th day of the same month, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable Henry G. Connor, District Judge of the Eastern District of North Carolina.

Among others were the following proceedings, to-wit:

2 *Bill of Complaint.*

Filed July 3, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,

vs.

THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Bill of Complaint.

To the Honorable Judges of said Court:

The Bill of Complaint of the Red "C" Oil Manufacturing Company, a corporation of the State of Maryland, duly organized and existing under and by virtue of the laws of that State, having its principal office in the city of Baltimore, in the State of Maryland, and being a citizen of said State, against the Board of Agriculture and Wm. A. Graham, Commissioner of Agriculture, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, cons-ituting the Board of Agriculture, defendants, all of said defendants being citizens of the State of North Carolina, and their office or place of business being in the City of Raleigh and in the Executive Department of North Carolina, and in the Eastern District of North Carolina.

And thereupon your complainant says:

1. That the citizenship of the parties, complainant and defendants, is as above set forth.

3 2. The complainant herein was duly created, organized and incorporated under the General Laws of the State of Maryland, on the 12th day of February, 1878 and thereby it became and was *i*nd is a corporation, exercising general powers and particularly the power to buy, sell, deal in, and otherwise dispose of illuminating oil and other products of petroleum. A true copy of its said charter is herewith filed as a part of this bill, marked Exhibit No. 1.

3. That by the terms of its said charter, it is authorized to purchase, sell and otherwise dispose of petroleum and buy the products and by-products thereof in the State of Maryland and elsewhere in the United States and under and by virtue of said powers and of the other powers given it by its said charter, the complainant is now engaged in and continuously for the last several years has been engaged in the business of buying and selling petroleum oil and other products and by-products thereof in the state of North Carolina and in other States, and in order to supply the trade in said State of North Carolina, it has been and is now engaged in the business of shipping over the railroads and other transportation lines extending from Maryland through other States and into and through the State of North Carolina large quantities of illuminating oil and other products and by-products of petroleum.

4. That the complainant is and for the last several years has been engaged in doing a large inter-state business in the buying and selling of oil and shipping the same from the State of Maryland and other points without the State of North Carolina into the said State of North Carolina, and in and between said State of North Carolina and the said State of Maryland and other States of the United States, and for the last several years has been con-

4 tinuously engaged in the said State of Maryland and of North Carolina, and in other States, in foreign commerce, and it has been for a number of years engaged in Baltimore, Maryland, in the manufacture and sale of kerosene oil and that *is* has a large amount of capital invested in buildings, machinery and materials used in such manufacture of the aggregate value of more than $100,000.00, and that in the general business of the manufacture and sale of oils in this State many hundreds of thousands of dollars of capital are invested and used, and thousands of agents and laborers employed and paid, that it is now shipping large quantities of oil into the State of North Carolina and desires to continue to ship into said State large quantities of its said goods to meet the requirements of its trade and increasing demands of the public for the same.

5. That at its session held in the year 1909, the General Assembly of North Carolina passed an act entitled, "An Act to Provide for the Inspection of Illuminating Oils and Fluids." The said act was ratified on the 8th day of March, 1909, and is hereinafter referred to as the act for inspecting illuminating oils. Said act is as follows:

"An Act to Provde for the Inspection of Illuminating Oils and Fluids.

The General Assembly of North Carolina do enact:

SECTION 1. That all kerosene or other illuminating oils sold or offered for sale in this State for illuminating purposes shall be subject to inspection and test to determine the safety and value for illuminating purposes. All manufacturers wholesalers and
5 jobbers, before selling or offering for sale in this State any kerosene or other oil for illuminating purposes, shall file with the Commissioner of Agriculture a statement that they desire to do business in the State, and furnish the name or brand of the oil or oils which it is desired to sell, with the name and address of the manufacturer, and that the oil or oils will comply with the requirements of this act. The Department of Agriculture shall have power at all times and at all places to have collected samples of any illuminating oils offered for sale, and have the same analyzed. The inspection of oils, as authorized in this act, shall be under the direction of the Board of Agriculture, which is authorized to make all necessary rules and regulations for the inspection of such oils and to adopt standards as to safety, purity or absence from objectionable substances and luminosity when not in conflict with the provisions of this act they may deem necessary to provide the people of the State with satisfactory illuminating oil.

SEC. 2. The Board of Agriculture shall appoint such number of oil inspectors as will be necessary, not exceeding one for each congressional district, whose compensation shall be fixed by the Board of Agriculture, not to exceed one thousand dollars and expenses each per annum. Each inspector, before entering upon his duties, shall take an oath of office before some person authorized to administer oaths. The inspector shall have power to ex-
6 amine all barrels, tanks or other vessels containing kerosene or other illuminating oils, to see that they are properly tagged as required in this act, and they shall, as directed, collect and test samples of oil offered for sale in different sections of the State, and when instructed collect and send samples to the Department of Agriculture for examination.

SEC. 3. For the purpose of defraying expenses connected with the inspection, testing and analyzing oils in this State, there shall be paid to the Commissioner of Agriculture a charge of one-half cent per gallon, which payment shall be made before delivery to agents, dealers or consumers in this State. Each barrel, tank, tank car or *or* container of oil shall have attached thereto a tag or stamp stating that all charges specified in this section have been paid; and the Commissioner of Agriculture, with the advice and consent of the board, is hereby empowered to prescribe a form for such tags: Provided, that they shall be such as to meet the requirements of the trade in oils, and to adopt such rules and regulations as will insure the enforcement of this law. Where oil is shipped in tank cars or other larger con*a*iners, the manufacturer or jobber shall give notice to the Commissioner of Agriculture of every shipment, with the name and ad-

dress of the person, company or corporation to whom it is sent, and the number of gallons, on the day the shipment is made.

7 SEC. 4. All moneys received under the provisions of this act shall be paid into the State Treasury and kept as a distinct fund, to be styled "The Oil I-spection Fund." All checks or orders in payment for tags or stamps shall be made payable to the State Treasurer. The Commissioner of Agriculture is authorized to draw out of said fund, upon his warrants, such sums as may be necessary to pay all expenses incurred in connection with this act, including salary of oil chemist or chemists, cost of inspection, tags blanks, etc.

SEC. 5. The State Treasurer shall, on the first day of June and December each year, turn into the general fund of the State all moneys of the oil fund in his hands in excess of the amount drawn out by the Commissioner of Agriculture for expenses.

SEC. 6. The Commissioner of Agriculture shall include in his report to the general assembly an account of the operations and expenses under this act.

SEC. 7. Whenever a complaint is made to the Department of Agriculture in regard to the illuminating qualities of any oil sold in this State the Commissioner shall cause a sample of said oil or oils complained of to be procured and have the same thoroughly analyzed and tested as to safety and illuminating qualities. If such analysis or other tests shall show that the oil is either unsafe or of inferior illuminating quality, its sale shall be forbidden and report of the result or results be sent to the party making the complaint and to the manufacturer of said oil.

8 SEC. 8. Every person who shall fraudulently brand or stamp any package or barrel or other vessel, or use a stamp a second time, or keep any kerosene or other illuminating oil not marked and branded in accordance with the regulations of the Board of Agriculture, or violate any other provisions of this act or any regu*a*ltion adopted by the Board of Agriculture for its enforcement, shall be guilty of a misdemeanor and fined not less than two hundred dollars ($200) for each offense nor more than one thousand dollars ($1,000).

SEC. 9. If any person, manufacturer or dealer shall sell or offer for sale in this State any of said illuminating oils and fluids befo*f*e first having the same labeled and tagged as required by the regulations adopted by the Board of Agriculture, he shall be guilty of a misdemeanor and on conviction be fined not exceeding three hundred dollars ($300), and the said oils and fluids be forfeited and sold, and the proceeds thereof go to the common school fund of the State. If any manufacturer or dealer of said illuminating oils or fluids shall, with intent to deceive or defraud, alter or erase the label or tag to indicate a different flash test, gravity or quantity than is indicated by the label or stamp attached to the vessel, he shall on conviction be fined not exceeding fifty dollars ($50) for every such offense.

SEC. 10. Any inspector who, while in office, shall *e* interested, directly or indirectly, in the manufacturer *o*f vending of any of the illuminating oils, shall be guilty of a misdemeanor, and on

9 conviction shall be fined not less than three hundred dollars ($300).

SEC. 11. All prosecutions for fines and penalties under the provisions of this act shall be by indictment in a court of competent jurisdiction.

SEC. 12. The provisions of this act shall not apply to the retail dealer in oils unless such retail dealer shall sell or offer to sell oils of a manufacturer, wholesaler or jobber who refuses to comply with the provisions of this act.

SEC. 13. This act shall be in force from and after July first, one thousand nine hundred and nine.

Ratified this the 8th day of March, A. D. 1909."

The general Assembly of North Carolina at its said session also passed an act entitled, "An Act to Suspend the Collection of Taxes under Section 58 of the Revenue Act Because of the Higher Taxes Imposed by the Oil Inspection Act which was Ratified on the 9th day of March, 1909," and is hereinafter referred to as an act to suspend additional collection of taxes on oil. Said act is as follows:

"An Act to Suspend the Collection of Taxes Under Section 58 of the Revenue Act, Because of the Higher Taxes Imposed by the Oil-Inspection Act.

PREAMBLE. Whereas, since the passage and ratification of the act to raise revenue at the present session of the General Assembly, a law has been passes providing for the inspection of illuminating oils and for the imposition of an inspection tax of one-half (½) a cent per gallon thereon; and whereas the said tax is much greater than the tax imposed under section fifty-eight of the Revenue Act; and whereas it is not the purpose of the General Assembly that the said taxes shall be cumulative: now, therefore,

The General Assembly of North Carolina do enact:

SEC. 1. That the tax imposed under section fifty-eight of the act to raise revenue upon d-alers in oils shall be suspended and shall not be hereafter collected from any persons, dealers or corporations paying the taxes imposed under the inspection law enacted at the present session of the General Assembly, entitled "An Act to provide for the inspection of illuminating oils and fluids." Provided, however, if the said Oil Inspection Act should be held invalid, section fifty-eight, Revenue, Act, shall remain in full effect.

SEC. 2. That this act shall be in force from and after its ratification.

Ratified this the 9th day of March, A. D. 1909."

6. At its session held in the year 1901, the General Assembly of North Carolina passed an act creating the department of Agriculture, immigration and statistics, which shall be under the control of the Commissioner of Agriculture, with the consent and advice of a Board to be styled the Board of Agriculture, Said act provides that the Board of Agriculture shall consist of Commissioner of Agriculture, who shall be ex-officio, member and chairman thereof, and of ten other members, one of whom shall be chosen from each Congressional District. The members of such Board shall be ap-

pointed by the Governor by and with the consent of the
11 Senate. Each member of the Board of Agriculture shall receive certain compensation, consisting of mileage and per diem. The Board is given power by said act to hold in trust donations or bequests to it for promoting the purposes of the department, and shall have general supervision and control of the finances of the department and to regulate the salaries of officers and employees of the department, and said Board by said act are required to meet at least twice a year in the City of Raleigh for the transaction of business, and they are given various other powers and duties by said act. Among other duties, to investigate and report on commercial fertilizers and composts, and the improvement of milk and beef cattle and conditions of cattle.

7. That the above mentioned defendants, Wm. A. Graham, H. C. Carter, K. W. Barnes, Ashley Horne, Wm. Dunn, Robert W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, constitute the Board of Agriculture of the State of North Carolina, the said W. A. Graham being Commissioner of Agriculture, and the others, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford and A. Cannon, being the members thereof, chosen from each congressional district; and all of said defendants have their offices in the City of Raleigh in the State of North Carolina and in the Eastern District, and H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, A. T. McCallum and J. P. McRae are inhabitants of and reside in the Eastern District of North Carolina and have their office and official residence in Raleigh.

8. That the effect of said act for the inspection of oil, if enforced, would, as will appear from the consideration now about to be set forth, be to abridge the privileges and immunities of the complain-
12 ant and to deprive it of its property without due process of law and to deny it the equal protection of laws, contrary to the 14th amendment of the Constitution of the United States, the benefit and protection of which the complainant respectfully sets up and claims; and to lay imposts, and duties on imports, under the guise of executing the inspection laws of North Carolina, contrary to article one, section ten, of the constitution of the United States, the benefit and protection of which the complainant respectfully sets up and claims; and to law and collect a tax, duty and impost upon the complainant and to regulate commerce among the several states, contrary to article one, section eight of the Constitution of the United States, the benefit and protection of which the complainant respectfully sets up and claims.

9. That the defendants constituting the Board of Agriculture, during the month of June, 1909, met in the City of Raleigh in order to give effect to the said bill for the inspection of oil, and that they took steps accordingly, and appointed a number of oil inspectors, to-wit; one for each congressional district, and adopted rules and regulations for the inspection of, which said rules are as follows:

Regulations of the Department of Agriculture Concerning Illuminating Oils and Fluids.

(Chapter 554, Laws 1909.)

I. The statement required of manufacturers and others desiring to sell oil in this state in section one of this Act, shall be in substance as follwos:

Commissioner of Agriculture, Raleigh, N. C.:

13 The —— —— desires to sell in North Carolina the following brands of illuminating oil:

1. (Name) —— ——.
2. (Name) —— ——.

Manufactured or sold by —— ——, whose address is —— P. O. ——.

And it is stipulated that said oils shall comply with the requirements of said Chapter 554, Laws 1909, and the regulations of the Board of Agriculture made by authority of said Act.

—— ——.
(Signature)

2. Thaer shall be placed upon each tank car before the same is emptied into storage tank or tnaks and upon other original packages (where kerosene oil is sold in the original package), the name under which it is sold, the name of the manufacturer or wholesale dealer, date when filled, and when the barrel or other container is filled from a tank car or large container, the number of said tank car or other container; also tax stamp as required in section three of Chapter 554, Laws 1909. But no tax st-mp shall be required upon a vessel filled from a container upon which required tax has been paid. All oil Upon inspection, shall show the test as marked upon the container. All tax stamps and statements as required in this section shall be removed from all containers or cannceled before refilled.

3. The oil chemist shall analyze such samples as deemed
14 necessary to ascertain safety and objectionable substances, purity and luminosity, and report to the Commissioner of Agriculture any standards he deems advisable to be established in these particulars.

4. By authority of said section there shall be appointed ten inspectors.

5. Each enspector shall examine all tank cars, barrels, drums, cans or other containers found in his district and see that they are properly tagged and collect samples as directed and send to the Department for analysis by the Oil Chemist.

6. Each inspector shall receive three dollars per day and actual expenses while at work.

7. The Commissioner of Agriculture shall have prepared tax stamps of such denominations and in such quantities as may be deemed necessary to execute this act. The Secretary of the Board

shall have charge of these stamps and deliver to the Oil Clerk from time to time such amounts as will be necessary to supply the demand, and shall make settlement quarterly of the amounts of tags disposed of.

8. All kerosene or other oils usually used for illuminating purposes offered for sale or sold in this state for other use shall have plainly marked on the container in letters at least two inches high, or plainly printed on a tag attached thereto, "Not for Illuminating Purposes—Highly Inflammable." Such oil is not subject to taxation. Using or selling it for illuminating purposes shall be
15 a violation of the section 8 of the act.

9. Shipment by car load of oil in barrels, drums or other containers shall be reported to the Commissioner as is required for shipment in tank cars, or other large containers, by section four, Chapter 554, Laws 1909.

10. No person shall offer to a common carrier for shipment empty barrels used for illuminating oils, upon which the tax stamps have not been cancelled.

11. All oil on hand en this state July first prox. shall be subject to the tax of one-half cent per gallon, but shall not be rejected for sale under this act prior to Oct. 1st, 1909, provided its fire test is not lower than 120 Degrees Fa-renheit.

12. The flash test of illuminating oils shall not be less than 100 degrees Fa-renheit as tested by the Elliot method—closed cup—according to directions prepared by the State Oil Chemist.

13. The Commissioner, with the approval of the Oil Committee, may suspend or change any of these regulations until the ensuing meeting of the Board.

____ ____,
Commissioner, Oil Committee.

June 28th, 1909.

And they have given it out and threatened that they will proceed to enforce said act and particularly to enforce the pains, penalties and forfeitures provided for by sections 8 and 9 of the said act.
16 Section 8 of said act provides that every person who shall fraudulently brand or stamp any package or barrel or other vessel or use the stamp a second time, or keep any kerosene or other illuminating oil not marked and branded in accordance with the regulations of the Board of Agriculture for its enforcement, shall be guilty of a misdemeanor and fined not less than $200.00, nor more than $1,000, for each offense.

Section 9 provides, in substance, that the sale, or offer to sell, any oil not tagged shall be a misdemeanor and the person offending shall be fined not exceeding $300.00, and the said oils be forfeited and sold, and it likewise provides that any person who shall offer to erase any label shall be fined not exceeding $50.00 for each and every offense.

Section 11 of said act provides that all prosecution for fines and penalties under the provisions of the act shall be by indictment in a court of competent jurisdiction, and the defendants herein, con-

stituting the Board of Agriculture, threaten that they will institute criminal prosecution for alleged misdemeanors against your complainant for each package or oil that it may sell or offer for sale, without complying with the requirements of the said act.

10. That the said defendants claim that complainant's goods are liable to seizure, and the complainant and its agents and servants are liable to the fines, forfeitures, penalties and criminal prosecutions under said act, unless complainant shall pay one half cent per gallon upon all oil shipped into the State of North Carolina, and shall otherwise comply with the provisions of said act.

17 11. That under the guise of exercising the police power of the state for the inspection of illuminating oil, the said bill for the inspection of oil and the said act to suspend additional collection of taxes on oil, constitute an impost or excise tax upon complainant's goods shipped into the State of North Carolina from the sister State of Maryland, and as above stated, are in violation of article one, section 8, and article one, section 10 of the Constitution of the United States, also of the 14th amendment of the Constitution of the United States.

12. That the said act to regulate the inspection of oil is not a proper exercise of the police power of the State of North Carolina, for that no rules and regulations are set forth in the said act for the performance of the said powers and duties, and for the inspection of oil, but by said act the entire matter of the inspection of oil, and fixing the standard therefor, is left to the Board of Agriculture under such rules and regulations as they may choose to adopt, and the said act and the regulations of the defendants provide for an inspection for value and luminosity, which this complainant alleges is not within the competency of legislative action; that the danger to life and property from the explosion of illuminating oil, for many years, has been reduced to a minimum, and there is no danger whatever at this time from the same. This is well known to the commercial world and is due to the fact that all of the explosive by-products of crude petroleum are of much greater commercial value than kerosene or illuminating oil, and all said explosive products are in greater demand commercially than the supply, and are extracted from the crude petroleum before the manufacture of kerosene or

18 illuminating oil, and the act for the inspection of oil is not a- act for the safety of the people of the State of North Carolina, but is in truth and in fact, an act to raise revenue, all of which appears from the second act hereinbefore referred to, to-wit: the act to suspend the additional collection of tax on oil, and also from sections four and five of said act for the inspection of oil, which provides that the excess remaining in the hands of the Commissioner of Agriculture after defraying the expenses of the salary of the oil chemist, cost of inspection, etc., shall be turned over to the State Treasurer, and by him turned into the general fund of the State, and also because, as above stated, kerosene oil in common use and all of the kerosene oil of your complainant, is absolutely non-explosive and there is no necessity and no demand for the inspection

of such oil to promote the safety of persons who are using or shall use the same.

13. Your complainant alleges and charges that the imposition upon it of a tax of one half cent per gallon upon each gallon of oil shipped by it into this State, and the requirement that this complainant shall comply with the rules and regulations prescribed by the State Board of Agriculture for the shipment of oil into the State of North Carolina, are illegal, oppressive, and contrary to the spirit and letter of the Constitution of the United States; that said tax is more than double the amount necessary for the inspection proposed under the statute and regulations, and the defendants estimate that they will be able to turn into the State Treasury annually, after paying all expenses, at least $20,000.00.

14. Your complainant further shows that if the defendants are permitted to carry into execution their threat to make a seizure in every case of shipments of oil for sales of your complainant's oils in the State of North Carolina, the said act allowing them so to do, without giving bond, and permitting them to institute criminal prosecution at their pleasure on account of such sale of oil upon which no tax has been paid, and no tax placed, will subject complainant to unjust and oppressive litigation, and that its business in the State of North Carolina will be utterly destroyed and that it will suffer irreparable loss and damage, and that the damage which is thus threatened and which will be occasioned to the complainant will far exceed $2,000.00.

15. Your complainant further shows that if the said act is put into effect and the regulations are enforced, complainant will be subject to a multiplicity of suits and indictments and will be put to great expense in order to defend itself in said suits and indictments against said unconstitutional and void statutes and regulations; that in addition to the expense and annoyance arrising out of the said numerous suits and indictments, the complainant's business will be greatly hampered and restricted and its standing and reputation among the people of North Carolina would be seriously injured.

16. Your complainant alleges and charges that said act does not prescribe any standard, but leaves to the Board of Agriculture the power to fix the standard for oils, without fixing any limit upon the exercise of this power upon the Board of Agriculture, which power is arbitrary, void and unconstitutional and has been exercised by the said Board of Agriculture in an arbitrary manner, and tests have been prescribed by said Board which are not necessary in order to procure the safety of oil and to protect the people from the sale of oils which are dangerous.

17. Your complainant further charges that the tax of one half cent per gallon is amply sufficient for the purpose of inspecting all the oil sent into the State before its sale, and the use thereof for illuminating purposes, but that the said act and the regulations of the Board of Agriculture do not provide for such inspection, but only contemplate an inspection after the oil has gone into the market and after a great part thereof has been used and the

danger, if any, has been taken; that neither the said act nor said regulations provide for the inspection of all oil, but only of such as may be complained of.

18. Your complainant further alleges that all illuminating oils used in the State of North Carolina are shipped from beyond the State.

19. Your complainant has at all times fully complied with the laws of the State of North Carolina bearing upon its business, and now avers its readiness to secure the payment of such taxes as the Court may be of opinion are legal, and it further avers that unless the injunction be granted as hereinafter prayed, and relief be given to it in this suit, it will be irremediably injured.

20. Your complainant further alleges that the regulations adopted by the Board of Agriculture are not warranted by the statutes, and operate unequally and to the prejudice of your complainant, which is an independent oil company, and unequally toward the other independent oil companies, and in favor of the Standard Oil Company, in that, while the statute itself only requires reports to be made to the said Board of Agriculture, of shipments in tank cars and other large vessels, the Board of Agriculture, in its regulations, undertakes to require notice to it of shipments in car load lots in barrels; that this regulation operates to the injury of the independent oil companies, who alone, as a rule, ship in barrels and
21 car load lots in barrels, and the effect of requiring notification to the Board of Agriculture of such shipments will be to furnish information to the Standard Oil Company of the business being done by your complainant, and other independent oil companies; and further, the regulations made by the said Board of Agriculture allow the sale of oil now stored in the State, without meeting the requirements of the general inspection regulation, until October 1st, but makes no provision for the sale of oil shipped into the State after the 1st of July, and between then and the 1st of October, and your complainant avers that the effect of said regulation is to enable the Standard Oil Company to dispose of vast quantities of oil between the first of July and the first of October which do not come up to the requirement made by the said Board of Agriculture, whereas the independent companies, having little oil in North Carolina, will be compelled to meet the higher standard required by said regulation; that said Standard Oil Company now has in North Carolina many thousands of barrels of oil in store and by reason of said regulation is given a great advantage over your complainant and other independent oil dealers.

21. Your complainant further alleges that the regulations adopted by the defendants, constituting the Board of Agriculture, are unequal, oppressive and not warranted by the act aforesaid, and particularly that Section 8 thereof is beyond the authority of the defendants and is calculated to and does do great injury to your compla-nant; that your complainant sells large quantities of oil to be used for other purpose- than illumination, particularly for
22 cleaning saws and other like purposes, and under the terms of said act, oil sold for such purposes is not subject to the

tax, nor to inspection, and the requirement that such oil shall be marked "highly inflammable" tends to destroy the sale thereof and to bring it into disrepute, and is absolutely unnecessary for any purpose within the scope of said act; that said regulation is furthermore void because it undertakes to make use of such oil for illuminating purposes a misdemeanor; that Section 12 of the said regulations is uncertain, oppressive and calculated to mislead your complainant and other dealers in oil, in that it provides a test for oil and requires said test to be made according to directions prepared by the State Oil Chemist, without furnishing any directions for making said test, thereby leaving the test uncertain and subjecting your complainant and all other dealers in oil to the possibility of having oil which will pass the test of 100 degrees Fahrenheit, as tested by the Elliott method, closed cup, rejected by reason of the said oils failing to meet the said test when tested according to directions prepared by the State Oil Chemist; that said section and said requirement is a snare and imperils the entire business of your complainant and the other dealers in oil; that it is uncertain unreasonable and not warranted by the statute under which it professes to operate; that Section 13 of said regulations is unjust, illegal and oppressive in that it provides for the change of said regulations at any time by the Commissioner, with the approval of the oil committee, whereas the statute places the making and changing of the regulations upon the whole Board of Agriculture; that said regulation 13 can be used to the utter destruction of complainant's business in that complainant may prepare itself to furnish the oil according to the standare now promulgated, and before it can market its oil, the regulations may be changed by the Commissioner
23 and the oil committee.

In consideration whereof, and for as much as your complainant is remediless in the premises under the rules of the common law and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end, therefore, that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were again here repeated, and they were thereunto specially interrogated, but not under oath, answer under oath being expressly waived, the complainant prays that the said defendants be required so to answer, and that a- injuncdon may re issued out of this court, enjoining and prohibiting the defendants, Wm. A. Graham, H. C. Carter, Wm. Dunn, K. W. Barnes, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford and A. Cannon, constituting the Board of Agriculture of North Carolina, and each of them individually, and jointly, as constituting the Board of Agriculture of North Carolina, and each and all of their successors in office from preparing and publishing the rules and regulations giving effect to the said act for the inspection of oil, and from taking steps under or in persuance of the said act of the General Assembly of North Carolina entitled, "An act to provide for the inspection of illuminating oils and fluids," ratified the 8th day of March, 1909, and from taking

any steps in pursuance of any of the laws of the State of North Carolina, either directly or through the said Wm. A. Graham, Commissioner, of Agriculture, or any of the other defendants or otherwise, to enforce either of the said acts or the penalties therein prescribed, or any other penalties therein prescribed, or any other penalties against the complainant, or against any of its officers, agents, or employees, for shipping into the State of North Carolina, or selling in said State, without paying a tax of one half cent per gallon upon all oil so shipped into said State, and fixing a
24 tax as provided by said act, and enjoining the defendants, each and every of them, and their and each of their successors in office, from taking any steps under the laws of North Carolina by themselves or through any agent or otherwise for the purpose of enforcing said act, or any of the penalties thereby prescribed or any other penalties against complainant or against any of its officers, agents, or employees for a failure to comply with said act of the General Assembly of North Carolina, or any of the provisions thereof and enjoining each and all of said defendants their servants or agents, from instituting or bringing, or causing to be instituted or brought, as aforesaid, any suit, either in law or equity, against your complainant, compelling your complainant to put into effect or observe said act; and enjoining and prohibiting said defendants and each and every of them from bringing or prosecuting any action or proceeding, civil or criminal, against your complainant, or any of its officers, agents or employees for penalties or fines or damages or for any cause of action whatsoever for failure to comply with said act, and that the said act and each and every provision of the same be declared to be unreasonable, unfair and unjust to the complainant and unconstitutional, null and void.

That in the meantime, and, until a decision can be had upon your complainant's motion for the injunction herein prayed, a restraining order may be granted, restraining the acts stated herein to be enjoined, your complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until such motion for an injunction be issued commanding and enjoining the defendants, as above prayed, and that on a final hearing said injunction, as herein prayed, *amy* be made perpetual.

That this complainant may have leave to make by supple-
25 mental process as new parties defendant, as occasion may require, any person or corporation who may appear, asserting against this complainant or against any of its officers, agents or employees, any alleged right or remedy under either of said acts, or otherwise, because of the failure of complain-t to observe any rule or regulation of the defendants.

May it please your honors to grant unto your complainant the temporary restraining order aforesaid, the writ of injunction aforesaid, and the writ of subpœna addressed to the said defendants, Wm. A. Graham, C. L. Carter, K. W. Barnes, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford and A. Cannon, individually and as constituting the Board of Agriculture of North Carolina, commanding said defendants, under a

penalty therein named, to appear in this court on some certain date, to be thereby fixed, to answer the premises and abide by and perform such decree as may be passed herein, but said answer, as above stated, not to be made on oath, answer under oath being expressly waived. This is the first application by your complainant for a restraining order or injunction in this case.

THE RED "C" OIL MANUFACTURING CO.
By WILLIAM H. FEHSENFELD,
President.

AYCOCK AND WINSTON,
Solicitors for Complainant.

26 UNITED STATES OF AMERICA:

Circuit Court for the Eastern District of North Carolina.

Personally appeared before me, H. L. Grant, Clerk of the Circuit Court of the United States for the Eastern District of North Carolina, W. H. Fehsenfeld, who upon being first duly sworn, deposes and says: That he is President of the Red "C" Oil Manufacturing Company, the complainant in the foregoing bill of complainant, that he has personal supervision of the business of said company; that he has read the foregoing bill and knows the contents thereof; that the facts therein stated on complainant's knowledge are true; and that the facts therein stated upon complainant's information and belief, he believes to be true.

WM. H. FEHSENFELD.

Subscribed and sworn to before me this the 1st day of July, 1909.

H. L. GRANT, *Clerk,*
By GEO. L. TENNOFFSKI, *D. C.*

27 Copy.

EXHIBIT No. 1.

Red "C" Oil Manufacturing Company of Baltimore City.

Certificate of Incorporation.

Know all men by these presents that we, Hugh Gordon Stewart, James Edward Stansbury, Fredrick Douglass Morrison, Myron I. Rose and Edward Donaldson Moore, all resi*ed*nts of Baltimore City, Maryland, being citizens of the United States and a majority of whom are citizens of the State of Maryland, do hereby certify that we do under and by virtue of the General Laws of this State authorizing the formation of corporations hereby form a corporation under the name of the Red "C" Oil Manufacturing Company of Baltimore City.

2. We do further certify that the said corporation so formed is a corporation for the manufacture, purchase and sale of illuminating and lubricating oils, that the term of existence of the said corporation is limited to forty years and that the said corporation is formed upon the articles, conditions and provisions herein expressed, and subject in all particulars to the limitations relating to corporations which are contained in the General Laws of this State.

3. We do further certify that the operations of the said corporation are to be carried on in the City of Baltimore, State of Maryland, and that the principal office of the said corporation will be located in Baltimore City.

4. We do further certify that the aggregate of the Capital stock of the said corporation is one hundred thousand dollars, and
28 that the said capital is divided into five thousand shares of the par value of twenty dollars each.

5. We do further certify that the said corporation will be managed by the incorporators and that Hugh Gordon Stewart, Fredrick Douglass Morrison, James Edward Stansbury, Myron Isacher Rose, Edward Donaldson Moore, are the names of the incorporat*ions* who will manage the concerns of the said corporation for the first year.

In witness whereof we have hereunto set our hands and the seals this ninth day of February, in the year eighteen hundred and seventy eight.

HUGH GORDON STEWART. [SEAL.]
F. D. MORRISON. [SEAL.]
JAS. E. STANSBURY. [SEAL.]
M. I. ROSE. [SEAL.]
EDWARD D. MOORE. [SEAL.]

Witness:
JOHN T. MADDOX.

STATE OF MARYLAND,
Baltimore City, To wit:

Before the subscriber, a justice of the Peace of the State of Maryland, in and for the City of Baltimore, personally appeared on this the ninth day of February, eighteen hundred and seventy eight, Hugh Gordon Stewart, Fredrick Douglass Morrison, James Edward Stansbury, Myron Issacher Rose, Edward Donaldson Moore and severally did acknowledge*d* the fore*b*oing certificate to be their act and deed.

JOHN T. MADDOX, *J. P.*

29 I, Henry F. Garey, one of the Judges of the supreme Bench of Baltimore City, do hereby certify that the foregoing certificate has been submitted to me for my examination and I do further certify that the said certificate is in conformity with the provisions of the law authorizing the formation of said corporation.

February 12th, 1878.

HENRY F. GAREY.

Filed for record, Feb. 12th, 1878, at 2 o'clock P. M. Same day recorded and indexed.

Per F. A. PREVOST, *Clerk.*

I hereby certify that the aforegoing is a true copy taken from Libary, F. A. P. No. 20, folio 8, etc., one of the Charter records of Baltimore City.

In Testimony whereof I hereto set my hand and affix my seal of the Superior Court of Baltimore City, this 11th day of November, A. D. 1901.

ROBERT OGLE,
Clerk of Superior Court of Baltimore City.

Service accepted July 8th, 1909.
WM. A. GRAHAM,
For Himself and Other Members of the Board of Agriculture,
Per R. H. BATTLE AND SON,
Attorneys.

30 *Equity Subpœna.*

Issued on the 3rd Day of July and Returned and Filed July 24, 1909.

Circuit Court at Raleigh, Fourth Circuit.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

The United States of America to Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, constituting The Board of Agriculture of North Carolina, Greeting:

We command You, and every of you, that you appear before the Judge of our Circuit Court of the United States of America, for the Eastern District of North Carolina, at the office of the Clerk of said Court, in the City of Raleigh in said District, on the First Monday in the month of August next, to answer the Bill of Complaint of The Red "C" Oil Manufacturing Company, citizen and resident of the State of Maryland, filed in the Clerk's Office of said Court, in said City of Raleigh, then and there to receive and abide by such Judgment and Decree as shall then or thereafter be made, upon pain of Judgment being pronounced against you by default.

To the Marshal of the Eastern District of North Carolina, to execute.

Witness, The Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Raleigh, in said District, the 3 day of July, 1909, and in the one hundred and 33 year of the Independence of the United States.

Issued the 3 day of July, 1909.

[SEAL.] H. L. GRANT, *Clerk.*

31 *Memorandum.*

The within-named Defendants are notified, that, unless they enter their appearance in the Clerk's office of said Circuit Court, at Raleigh as aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordin-ly.

H. L. GRANT, *Clerk.*

Marshal's Return.

Rec'd July 3rd, 1909, and executed by delivering copy to W. A. Graham, July 3, 1909, at Raleigh, N. C.

CLAUDIUS DOCKERY,
U. S. Marshal.

Received July 6th, 1909, at Maxton and executed the same by delivering copy to A. T. McCallum, July 7th, 1909, at Red Springs, N. C., and to J. P. McRae, July 8th, 1909, at Laurinburg, N. C.

CLAUDIUS DOCKERY,
U. S. Marshal,
By J. L. McLAUCHLIN, *D. M.*

Received at Wilson, N. C., July 9th, 1909, and executed by delivering copy to K. W. Barnes, July 10th, 1909, at Lucama, N. C.

CLAUDIUS DOCKERY,
U. S. Marshal,
By J. D. MEARES, *Deputy.*

R. W. Scott, A. Cannon, Wm. Bledsoe, and W. J. Shuford not to be found in this dist.

CLAUDIUS DOCKERY, *U. S. M.*
By J. T. SHARPE, *O. D. M.*

Received July 13th, 1909, at Newbern, N. C., and executed the same by delivering copy to William Dunn, July 13th, 1909 at Newbern, N. C., and to H. C. Carter, at Fairfield, N. C., July 19th, 1909

CLAUDIUS DOCKERY, *U. S. M.*
J. T. LINCOLN, *D. M.*

32 Rec'd and served July 9, 1909, upon Ashley Horn, by delivering a copy to him at Clayton, N. C.

CLAUDIUS DOCKERY, *U. S. M.,*
By J. B. JORDAN, *D. M.*

33 *Equity Subpœna.*

Issued on the 3rd Day of July and Filed July 27, 1909.

Circuit Court at Raleigh, Fourth Circuit.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

The United States of America to Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, constituting The Board of Agriculture of North Carolina, (This is a true copy of a writ sued out of the Court of this District) Greeting:

We command You, and every of you, that you appear before the Judges of our Circuit Court of the United States of America, for the Eastern District of North Carolina, at the office of the Clerk of said Court, in the City of Raleigh, in said District, on the First Monday in the month of August next, to answer the Bill of Complaint The Red "C" Oil Manufacturing Company citizen and resident of the State of Maryland, filed in the Clerk's Office of said Court in said City of Raleigh, then and there to receive and abide by such Judgment and Decree as shall then and thereafter be made, upon pain of Judgment being pronounced against you by default.

To the Marshal of the Western District of North Carolina to execute.

Witness, the Hon. Melvile W. Fuller, Chief Justice of the Supreme Court of the United States at Raleigh, in said District, the 3 day of July, 1909, and in the one hundred and 33 year of the Independence of the United States.

Issued the 3 day of July, 1909.

[SEAL.] H. L. GRANT, *Clerk.*

34 *Memorandum.*

The within-named Defendants are notified, that, unless they enter their appearance in the Clerk's office of said Circuit Court at Raleigh as aforesaid, on or before the day to which the within writ is returnable, the complaint will be t*kane* against them as confessed, and a decree entered accordingly.

H. L. GRANT, *Clerk.*

Marshal's Return.

Received July 9, 1909, Served July 10, 1909, as to W. J. Shuford, and July 12, as to A. Cannon by delivering to each of them a true copy of the within.

J. M. MILLIKAN, *U. S. M.,*
By K. S. RAMSEY.

Received July 20, 1909, Executed as to Wm. Bledsoe July 23, 1909, by delivering to him a true copy of the within.

J. M. MILLIKAN, *U. S. M.*,
By B. S. REYNOLDS, *D. M.*

Received July 19, 1909, Executed as to R. W. Scott July 19, 1909 by delivering to him a true copy of the within subpœna.

J. M. MILLIKAN, *U. S. M.*,
By T. W. VINCENT, *D. M.*

35 *Prosecution Bond.*

Filed July 8, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,

vs.

THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Bond.

We acknowledge ourselves bound to the defendants above named in the sum of Two Hundred ($200.00) Dollars, to be void nevertheless if the complainant shall pay to the defendants all such costs as may be adjudged against it in the above suit.

THE RED "C" OIL MANUFACTURING COMPANY,
By AYCOCK & WINSTON, *Attorneys.*
THE UNITED STATES FIDELITY AND GUARANTY CO.,
[SEAL.] By WM. B. JONES, *General Agent.*

36 *Restraining Order.*

Filed July 8th, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,

vs.

THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon.

Order.

Upon reading the verified Bill in this cause, and upon its being made to appear to the Court that there is danger of irreparable

injury to the complainant from delay, unless the acts sought to be enjoined herein are restrained until the hearing upon the motion for an injunction in this cause, it is now ordered:

1. That the defendants, The Board of Agriculture, and Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashely Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, constituting the Board of Agriculture of North Carolina, and each of them individually and jointly as constituting the said Board of Agriculture of North Carolina, and each and all of their successors in office and their and each of their agents and employees, be and they hereby are restrained and enjoined from preparing and publishing the rules and regulations giving effect to the act for the inspection of oil, referred to and set out in the fifth paragraph of complainant's Bill, and from taking any steps under or in pursuant of the said act of the General Assembly of North Carolina entitled "An Act to provide for the inspection of illuminating oils and fluids," ratified the 8th day of March, 1909, and from taking any steps in pursuance of the laws of the State of North Carolina, either directly or through the said Wm. A. Graham, Commissioner of Agriculture, or any of the other defendants, or otherwise, to enforce said act, or any other act, or the penalties therein prescribed against the complainants, and any of its officers, agents and employees, for shipping into the State of North Carolina, or selling in said State, its oils,
37 whether illuminating or otherwise, without complying with the provisions of said act, and without complying with the regulations of said defendants constituting the Board of Agriculture.

2. That the defendants, The Board of Agriculture, and Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, constituting the Board of Agriculture of North Carolina and each of them individually and jointly, as constituting the Board of Agriculture of North Carolina, and each of their successors in office, and their and each of their agents and employees, are and each of them is hereby restrained and enjoined from taking steps in pursuance of said act in respect to the inspection of illuminating oils and fluids, from bringing or prosecuting any action or proceeding, civil or criminal, against the complainant herein, any of its officers, agents or employees, for penalties or fines or damages, or for any cause of action whatsoever, for failure to comply with said act.

3. That the defendants and each of them show cause before the United States Circuit Court for the Eastern District of North Carolina, in the United States Circuit Court room, at Raleigh, North Carolina, before Hon. H. G. Connor, U. S. Judge, on the 2 day of August, 1909, at 10 o'clock A. M., why an injunction *pendente lite* as prayed in the Bill, should not be issued. That a copy of this order be served, *on* soon as practicable, upon each of the defendants.

4. That this restraining order shall be in force and effect from the date hereof, and until the determination of the complainant's

motion for an interlocutory injunction herein, upon the complainant's giving bond, his surety to be approved by the Clerk of the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh, North Carolina, in the penal sum of $10,000.00/100 payable to the defendants, conditioned as hereinafter provided. The condition of said bond shall be substantially as follows: that the complainant shall pay to the defendants all such
38 damages and costs as they shall sustain or shall finally be adjudged against it herein by reason of the issuing of this order. The *the* Clerk will enter.

July 5th, 1909.

J. C. PRITCHARD,
U. S. Circuit Judge.

A True Copy.
Attest:

[Seal United States Circuit Court, Eastern Dist. of N. C.]

H. L. GRANT, *Clerk.*

Marshal's Return.

Recd July 8, and served July 9, 1909 upon William A. Graham at Raleigh, N. C. by delivering a copy of this restraining order with him and upon the Board of Agriculture by delivering a copy to Wm. A. Graham, Chairman at Raleigh, N. C.

CLAUDIUS DOCKERY, *U. S. M.*

39 *Restraining Order Bond.*

Filed July 8, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Bond.

We acknowledge ourselves indebted to the defendants in the above entitled cause in the sum of Ten -and ($10,000.00) Dollars, to the payment of which we bind ourselves, our heirs, executors and administrators, and successors.

Signed and sealed this the 8th day of July, 1909.

The condition of the foregoing bond is such that: Whereas, the complainant above named has applied to the Circuit Court of the

United States for a restraining order herein against the defendants;

Now, Therefore, if the complainant shall pay to the defendants all such damages and costs as they shall sustain or shall finally be adjudged against it herein by reason of the issuing of said restraining order, then this bond shall be void, otherwise to remain in full force and effect.

THE RED "C" OIL MANUFACTURING COMPANY, [SEAL.]
By AYCOCK & WINSTON, *Attorneys.*
Surety: THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By WM. B. JONES, *Gen'l Agent.* [SEAL.]

The foregoing is hereby approved by me, the surety thereon is likewise approved and accepted.

H. L. GRANT,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

40 *Motion and Order.*

Filed July 8, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Motion.

The complainant respectfully represents to the Court that it appears from the Bill herein that the defendants, Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford and A. Cannon, together constitute the Board of Agriculture of the State of North Carolina, and that it further appears that they have no personal interest in the result of the suit, but only as members of said Board of Agriculture; that a temporary restraining order has been granted herein by His Honor, Judge Jeter C. Pritchard; that it will be expensive to serve copies of the Bill of Complaint and of said restraining order upon each of the defendants, and that a service upon the Board of Agriculture, as such, and upon the Commissioner of said Board, W. A. Graham, will be amply sufficient;

Wherefore the complainant prays that an order may be made,

directing that the service of a copy of the Bill and of the restraining order upon the Board of Agriculture, as such, and upon W. A. Graham, Commissioner of Agriculture, shall be deemed and taken to be a sufficient service upon each and all of the defendants.

THE RED "C" OIL MANUFACTURING CO.,
By AYCOCK & WINSTON,
Solicitors for Complainant.

41 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Order.

Upon reading the motion herein, it is ordered by the Court that the service of the Bill and of the temporary restraining order upon the Board of Agriculture, as such, and upon W. A. Graham, Commissioner thereof, shall be taken and deemed to be a sufficient service upon each and all of the defendants.

July 6, 1909.

H. G. CONNOR,
United States Dist. Judge.

42 *Amended Restraining Order.*

Filed July 14, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford and A. Cannon.

Order.

Upon reading the verified Bill in this cause, and upon its being made to appear to the Court that there is danger of ir-eparable injury to the complainant from delay, unless the acts sought to be enjoined herein are restrained until the hearing upon the motion for an injunction in this cause, it is now ordered:

1. That the defendants, The Board of Agriculture, and Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, constituting the Board of Agriculture of North Carolina, and each of them individually and jointly as constituting the said Board of Agriculture of North Carolina, and each and all of their successors in office and their and each of their agents and employees, be and they hereby are restrained and enjoined from preparing and publishing the rules and regulations giving effect to the act for the inspection of oil, referred to and set out in the fifth paragraph of complainant's Bill, and from taking any steps under or in pursuant- of the said act of the General Assembly of North Carolina entitled "An Act to provide for the inspection of illuminating oils and fluids," ratified the 8th day of March, 1909, and from taking any steps in pursuance of the laws of the State of North Carolina, either directly or through the said Wm. A. Graham, Commissioner of Agriculture, or any of the other defendants, or otherwise, to enforce said act, or any other act, or the penalties therein prescribed against the complainants, and any of its officers, agents and employees, for shipping into the State of North Carolina, or selling in said State, its oils, whether illuminating or otherwise, without complying with the provisions of said act, and without complying with the regulations of said defendants constituting the Board of Agriculture.

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2. That the defendants, The Board of Agriculture, and Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, constituting the Board of Agriculture of North Carolina and each of them individually and jointly, as constituting the Board of Agriculture of North Carolina, and each of their successors in office, and their and each of their agents and employees, are and each of them is hereby restrained and enjoined from taking steps in pursuance of said act in respect to the inspection of illuminating oils and fluids, from bringing or prosecuting any action or proceeding, civil or criminal, against the complainant herein, any of its officers, agents or employees, for penalties or fines or damages, or for any cause of action whatsoever, for failure to comply with said act.

3. That the defendants and each of them show cause before the United States Circuit Court for the Eastern District of North Carolina, in the United States Circuit Court room, at Raleigh, North Carolina, before Hon. H. G. Connor, U. S. Judge, on the 2 day of August, 1909, at 10 o'clock A. M., why an injunction *pendente lite* as praved in the Bill, should not be issued. That a copy of this order be served, *on* soon as practicable, upon each of the defendants.

4. That this restraining order shall be in force and effect from the date hereof, and until the determination of the complainant's motion for an interlocutory injunction herein, upon the complainant's giving bond, the surety to be approved by the Clerk of the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh, North Carolina, in the penal sum of $10,000.00/100

payable to the defendants, conditioned as hereinafter provided. The condition of said bond shall be substantially as follows: that the complainant shall pay to the defendants all such damages and costs as they shall sustain or shall finally be adjudged
44 against it herein by reason of the issuing of this order. The Clerk will enter.

5. That pending the final determination of this case, the complainant shall pay the one-half cent per gallon upon all illuminating oils sold by it in the State, as prescribed in said act.

J. C. PRITCHARD,
United States Circuit Judge.

July 5, 1909.

45 *Answer.*

Filed July 29, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Answer.

The Joint and Several Answer of All the Defendants Above Named to the Bill of Complaint of the Red "C" Oil Manufacturing Company, Complainant.

The defendants above named, reserving to themselves the right of exception to the said bill on account of its many defects, and especially for that the same doth not set forth facts sufficient to constitute a cause of action, for answer thereto, or to so much thereof as the defendants are advised it is material and necessary to answer, say:

1. The allegations in paragraph 1 of the bill are true as defendants are informed and believe.

2. The allegations of paragraph 2 in said bill are true as defendants are informed and believe.

3. The allegations of paragraph 3 in said bill are true as defendants are informed and believe.

4. It is true, as alleged in paragraph 4 of the bill, that complainant is and for several years has been engaged in doing an interstate business in buying and selling oil, and it is admitted that complainant has for a number of years been engaged in the manufacture and sale of kerosene oil in the city of Baltimore, in the state of Maryland; but as to the extent of business done, or capital invested, or laborers employed, these defendants have no knowledge or informa-

tion sufficient to form a belief, and if the averments
46 in the bill in regard to these matters shall be relied upon as essential, then these defendants will demand strict proof of the same.

5. It is true that the General Assembly of North Carolina, at its session of 1909, enacted the law set forth in paragraph 5 of the bill entitled, "An Act to Provide for the Inspection of Illuminating Oils and Fluids", and also enacted the law, entitled, "An Act to Suspend the Collection of Taxes Under Section 58 of the Revenue Act, Because of the Higher Taxes Imposed by the Oil Inspection Act". The said laws are found in the Public Laws of North Carolina for 1909, in Chs. 554 and 441 respectively, and reference is made to said chapters and they are made a part of this paragraph.

6. It is untrue that the Department of Agriculture was created by the act of 1901, referred to in paragraph 6 of the bill. The said Department was created and established by the General Assembly of North Carolina, Ch. 274, acts of 1876-1877, and the laws establishing the same were amended from time to time, and in the year 1901, said Department was reorganized, and its powers and duties are substantially stated in paragraph 6 of the bill, but for a more certain knowledge of the extent of the powers and duties of said Board of Agriculture reference is made to Ch. 87 of the revisal of 1905. The acts establishing the said Board of Agriculture were passed in pursuance of the mandate contained in article 3, section 17, of the Constitution of North Carolina, which declares: "The General Assembly shall establish a Department of Agriculture, Immigration and Statistics, under such regulations as may best promote the agricultural interests of the State".

47 7. The allegations contained in paragraph 7 of the bill are true.

8. It is untrue, as alleged in paragraph 8 of the bill, that the effect of said act when enforced will abridge the privileges and immunities of the complainant or deprive it of its property without due process of law, or deny it the equal protection of the law. It is also untrue that the effect of such act would be to lay imposts and duties on imports under the guise of executing the inspection laws of North Carolina or to regulate commerce among the states, or to lay and collect a tax duty and impost upon the complainant. And the defendants aver that the taxes are imposed exclusively for the purpose of raising revenue to pay the necessary expenses of inspecting oil so as to protect the citizens of North Carolina from being sold unsafe and impure illuminating oils; and the defendants further say that said act is not unconstitutional but is expressly authorized by article 1, section 10 of the Constitution of the United States.

9. It is true that the Board of Agriculture adopted the rules and regulations set out in paragraph 9 of the bill, but it is untrue that these defendants have given it out and threatened that they will proceed to enforce said act, and particularly, the pains, penalties and forfeitures provided in sections 8 & 9 of said act. The defendants say that if the complainant shall wilfully violate the laws of North Carolina, it will subject itself to prosecution at the hands of the

lawfully constituted authorities. It is true that the provisions of sections 8, 9 and 11, are substantially stated in the bill, but these defendants deny that they have threatened to institute any criminal prosecution for any alleged misdemeanors against complainant for each package that it may sell or offer for sale without complying with the requirements of said act. The said act imposes no
48 duty upon these defendants to institute criminal prosecutions and they have made no threats that they will do so, and defendants aver that complainant's agitation is due to its own fears and not to any threats made by defendants.

10. It is true, as alleged in paragraph 10 of the bill, that the defendants claim that complainant's goods will be liable to seizure and its agents and servants liable to prosecution and forfeiture under said act, unless complainant shall obey the same.

11. It is untrue that under the guise of exercising the police power of the State for the inspection of illuminating oil, the act providing for the inspection of oil, and the act to suspend additional collections of taxes on oil, constitute an impost or excise tax upon complainant's goods shipped into the State. The purpose of said act is clearly stated in the act itself, which declares that the said tax is levied "for the purpose of defraying expenses connected with the inspection, testing and analyzing oils in this state", and these defendants respectfully insist that the complainant cannot, in this Court of Equity, impeach or impugn the motives of the General Assembly of North Carolina, and it is untrue that said inspection taxes are in violation of the Constitution of the United States, as they are expressly authorized by article 1, section 10 of said Constitution above referred to.

12. It is untrue, as alleged in paragraph 12 of the bill, that said act to regulate the inspection of oil is not a proper exercise of the police power of the State, for that no rules and regulations are set forth in said act for the performance of the powers and duties vested in the State Board of Agriculture, and for that the fixing of the standard is left to the Board of Agriculture under such rules
49 as they may adopt, and for that said act and the regulations of defendants provide for an inspection for value and luminosity, and it is untrue that said act is not within the competency of legislative action. These defendants say the purpose of said act clearly appears upon its face to be to insure to the people of the State oils that are safe, pure, and that will give a satisfactory light, and the rules and regulations for ascertaining that oils are safe, pure, and will give a satisfactory light, are wisely and lawfully left to be determined by the Board of Agriculture. It is untrue that the danger to life and property from the explosion of illuminating oils has been reduced to a minimum and that there is no danger whatever from the same. It is true that a part of the explosive by-products of crude petroleum are of greater commercial value than kerosene or illuminating oils, but these defendants aver that there is enough of explosive substance left in the oil to make it dangerous to life and property, and this is shown by the fact that the most progressive and intelligent states in the Union have upon their

statute books oil inspection laws similar to the law of North Carolina. The statute of North Carolina, which is sought to be nullified, provides inspection to protect a citizen not only from unsafe and dangerous oils, but also, and chiefly, from impure, adulterated oils and from low-grade oils that will furnish no light. These defendants again respectfully insist that it is within the province of the legislature to determine the wisdom and necessity for inspection laws, and its findings of fact with respect to these matters cannot be assailed. It is untrue that the said act is an act to raise revenue, and it is untrue that this appears from the provision that any excess which may be left in the hands of the Commissioner after defraying the expenses shall be turned into the general fund
50 of the State, or that it appears from the act to suspend the additional collection of taxes on oil.

51 Continuation of Answer to Paragraph 12.

It is untrue tha*ll* all the oil sold by complainant is absolutely non-explosive, but on the contrary these defendants say that recently an inspector of the Department of Agriculture collected and sent to the Department a sample of oil sold by complainant in this State, which sample was tested by the Oil Chemist of the Department and showed a flash test of 88 degrees F. in the Elliot Closed Cup, and defendants are advised by said chemist, and so aver, that such an oil is explosive and is dangerous to life and property. This sample was taken before the restraining order was served, and these defendants say that they were prevented from obtaining further sample by the action of the complainant, and in this way a lot of oil has been allowed to be shipped into the State by the Standard Oil Company and others without reference to quality.

13. It is untrue, as alleged in paragraph 30 of the bill, that the imposition upon the complainant of a tax of ½¢ a gallon on oil shipped by it into the State, and the requirement that the complainant shall comply with the rules and regulations prescribed by the State Board of Agriculture for the shipment of oil into the State, are illegal, oppressive, and contrary to the Constitution of the United States, and it is untrue that said tax is more than double the amount that is necessary for the proper and thorough inspection of oils under the statute and regulations of the Board, and it is untrue that defendants have estimated that they will be able to turn into the State Treasury annually, $20,000.00 after paying all expenses of inspection. To the contrary; defendants say that they have made no estimate that any excess may be left after paying all the proper and necessary expenses of inspection, and these defendants say that they have no means of actually approximating the amount that the tax of ½¢ per gallon will yield, or the expenses of equipping and maintaining a competent inspection force and department. That the legislature thought that ½¢ a gallon would be necessary to pay the expenses of inspection, and these defendants are informed and believe, and therefore aver, that this is as low an inspection tax as there is to be found in any state having oil inspection laws, and lower than the taxes in a great many of the states. In some states there is

a graduated scale of taxation of more than ½ cent for small quantities and less than ½ cent for large quantities. The said act expressly provides, in section 6, that the Commissioner of Agriculture shall include in his report to the General Assembly an account of the expenses under this act. The said act also provides that all money paid for inspection taxes shall be kept by the State
52 Treasurer as a distinct fund to be styled, "The Oil Inspection Fund." At the end of one year, it can be seen exactly what the inspection costs and how much is paid for it by dealers in oil, and until it shall appear that said tax is excessive, a charge, to that effect, by complaint, is premature and illconsidered.

14. It is untrue, as alleged in paragraph 14, that the execution of said statute, and the regulations made in pursuance thereof, will be oppressive to plaintiff, or ruin its business, or do it irreparable damage, and these defendants say that any damage which complainant may sustain will be due to its own misconduct and not to anything done by these defendants.

15. It is untrue, as alleged in paragraph 15, that the enforcement of the said statute will subject complainant to a multiplicity of suits and indictments, unless it shall wilfully and unnecessarily violate said law, and it is untrue that such enforcement will hamper it in its business or injure its reputation in the State. To the contrary, these defendants say that if complainant will faithfully obey said law its reputation in North Carolina will be vastly improved.

16. It is true that said act prescribes no specific, technical standard, and that it is left to the Board of Agriculture to ascertain and declare such a standard, but it is not true, as alleged in paragraph 16, that there is no limit upon the exercise of this power by the Board, for said act expressly declares that such regulations shall not be inconsistent with the provisions of the statute, and the statute limits the standard to a safe, unadulterated oil that will give a satisfactory light. It is untrue that said power is arbitrary and void and has been exercised by the Board of Agriculture in an arbitrary manner, and it is untrue that tests have been prescribed by said
53 Board which are not necessary in order to procure a safe oil and to protect the people from oil which is dangerous. To the contrary, these defendants say that they fixed the standard after the most thorough, exhaustive and patient investigation, and after consulting with experts learned in the subject of oils and oil tests, and after this complainant and all other companies desiring to be heard had been given a full and fair hearing.

17. Whether the tax of ½¢ a gallon will be sufficient to pay for the investigation of all oils sent into the State before the sale and use thereof, as alleged in paragraph 17 of the bill, these defendants cannot say: it may, or it may not be sufficient. But it is untrue that the said act and regulations of the Board do not provide for such investigation but only contemplate investigation after the oil has gone into the market. It is also untrue that said act and regulations provide only for the inspection of such oils as may be complained of. The truth of this answer will readily appear by reading sections 1, 2, 7, 8 and 9 of the statute, and regulations 1, 2, and

especially 5, adopted by the Board of Agriculture, which last regulation provides: "Each inspector shall examine all tank cars, barrels, drums, cans or other containers, found in his district, and see that they are properly tagged and collect samples as directed and send to the Department for analysis by the Oil Chemist."

18. The allegation in paragraph 18 of the bill, that all illuminating oils used in this State are shipped from beyond the State, may or may not be true, but if the said allegation is essential, defendants pray that complainant be held to a strict proof of the same.

19. Defendants have no knowledge, or information sufficient to form a belief, as to whether complainant has complied with
54 the laws of the State of North Carolina and is ready to pay such tax as may be adjudicated to be legal, but defendants say it is untrue that if an injunction be not granted complainant will be irremediably injured.

20. It is untrue, as alleged in paragraph 20 of the bill, that the regulations adopted by the Board of Agriculture are unwarranted by the law and operate unequally to the prejudice of the complainant and other independent oil companies, and in favor of the Standard Oil Co., in the manner set forth in said paragraph. To the contrary, these defendants are informed and steadfastly believe and solemnly aver that the Standard Oil Co. would be delighted if defendants would adopt the rules and regulations insisted upon by complainant. If the said Standard Oil Co. had, as is alleged, on the first of July, a large quantity of oil stored in different parts of the State, and the complainant and various other companies had no oil stored, such fact is not the fault of these defendants or the fault of the law which was passed early in March last, and it was not and is not the intention of these defendants to give any company any advantage over any other company. In reference to the regulation of the Board of Agriculture that notice should be given of the shipment of oil in carload lots in barrels, the defendants say that such regulation, though not expressly provided for in the act, is a reasonable requirement for the protection of the people against spurious oils and for the speedy and inexpensive inspection of the same. It cannot be of much inconvenience to the oil companies to give such notice and it is respectfully submitted to the court as to whether the Board of Agriculture had authority to make this regulation. As to the effect of requiring notice to be given to the Board of Agriculture of shipments of carload lots in barrels, these defendants say that it will not follow that anyone save the shipper and the Agricultural Department will have any knowledge of such a notice. Such
55 a notice will not be a public report but private information for the benefit of the Department, and it is the fixed purpose of these defendants not to allow anyone to see such notices nor anyone connected with the Department to disclose the same.

21. That it is untrue, as alleged in paragraph 21, that the regulations adopted by the Board of Agriculture are unequal, oppressive and not warranted by the act. These defendants have not sufficient knowledge or information to form a belief as to how much oil the plaintiff sells for other purposes than illumination, but defendants

are informed and believe that not more than 20% of the oil offered for sale in North Carolina is sold for other purposes than illumination, and that as all kerosene oil is dangerous under certain conditions and becomes inflammable when it is accidentally or otherwise heated to 120 degrees F., it is a proper regulation to require such oils to be marked as "highly inflammable." It is untrue that section 12 of said regulations is uncertain, oppressive, and calculated to mislead the complainant and others in providing a test for oils according to the directions prepared by the State Oil Chemist. The defendants say that section 12 in providing that the flash test of illuminating oils shall not be less than 100 degrees F. by the Elliott method closed cup, is a proper regulation and the proposed publication of this test would be sufficient information to all concerned, and the defendants say that said test is the best known test in the world, and is approved by the highest authorities on oil inspection in this and other countries, and that therefore such regulation providing for said test is wise, reasonable, just and legal. In reference to section 13 of said regulations, defendants say that it is untrue that such regulation is unjust, illegal and oppressive in providing for a change in such regulations, but on the contrary, the authority given
56 to the Commissioner with the approval of the oil committee, which is composed of three members of the Board who were selected because of their fitness for the business, to suspend or change any of the regulations until the next meeting of the Board, was intended to be and will be found to be beneficial to dealers in oil because it is to be presumed that these officials would exercise this power only to modify the regulations when their enforcement would appear to be for any reason oppressive, or unjust, and these defendants say that they stand now ready to amend any of the said regulations whenever complainant, or any other dealer in oil, shall show to the defendants that any of said regulations are unreasonable or unjust.

22. The defendant, Wm. A. Graham, and the other defendants named in the bill, are members of the Board of Agriculture, which is a constitutional department and a part of the government of the State of North Carolina. That all the actings and doings of such defendants are the actings and doings of the Board of Agriculture and the State of North Carolina, and the defendants individually submit to the court whether they are proper parties to this suit.

23. That the defendant, the Board of Agriculture, is a department of the government of the State of North Carolina and is protected by the rights and sovereignty of the State. That the defendants are advised that the Circuit Court of the United States has no jurisdiction to maintain an action against a department of the State. Wherefore, the defendants having fully answered, pray that the restraining order heretofore issued herein be dissolved, that the prayer of the complainant be not allowed and the defendants be dismissed with their costs.

R. H. BATTLE & SON,
Solicitor- for the Defendants, Members of the Board of Agriculture.
T. W. BICKETT,
Att'y General for State of N. C.

57 UNITED STATES OF AMERICA,
Eastern District of North Carolina:

William A. Graham, one of the defendants above named, being duly sworn says, that the facts stated in the foregoing answer as of his own knowledge, are true, and those otherwise stated he believes to be true.

W. A. GRAHAM,
Commissioner.

Sworn to and subscribed before me on this the 29th day of July, 1909.

GEO. L. TONNOFFSKI,
Deputy Clerk U. S. Circuit Court.

58 *Affidavit of Dr. W. B. D. Penniman for Complainant.*

Filed July 31st, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE, and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

STATE OF MARYLAND,
City of Baltimore, To wit:

Before the undersigned, a Notary Public, duly commissioned and qualified in and for the City and State aforesaid, personally appeared William B. D. Penniman, who being first duly sworn according to law, on his oath says; that he is an analytical and consulting chemist; that he is a member of the firm of Penniman & Browne, Analytical and Consulting Chemist-, 213 Courtland Street, in the City of Baltimore, State of Maryland; that he holds the degrees of Master of Arts, Doctor of Philosophy, and Doctor of Medicine, and has been engaged in the practice of his profession for twenty-two years; that he is State Chemist of the State of Maryland, Collaborating Chemist for the Agricultural Department of the United States Government, Professor of Chemistry in the Baltimore Medical College, and is a member of the American Chemical Society and is Secretary of the Fertilizer and Agricultural Division of the American Chemical Society.

That in the course of the practise of his profession he has
59 had a large experience with burning oils; that for some years he had charge of the testing of the illuminating oils used throughout the system of the Baltimore & Ohio Railroad Company, and has likewise spent a large amount of time in the oil works of oil

refineries, and has made innumerable independent tests in his own laboratory for clients and in connection with research work carried on upon distillates of crude oils.

That according to the results of his personal tests, observations and experience, he asserts that the inspection of burning oils is unnecessary as a means of preventing too inflammable a product being put upon the market, owing to a change of conditions. That prior to the utilizing of gasoline for mechanical, motive and lighting purposes and the use of naphtha for enriching gas, the use of the heavier naphthas as a substitute for turpentine as well as an infinite number of smaller industrial uses, thereby increasing the demand for the naphthas (gasoline, benzine, &c.) resulting in an advance in the price of these products of from 50% to 300% over the price of burning oils commonly used for household lighting, such inspection was advisable, because by the introduction into the burning oils of quantities of the naphthas, disposition was made of what was then a low priced product, but with the increased demand and the advance of price of the naphthas (gasoline, benzine, &c.) no refiner will now introduce them into burning oils and such would not now occur, as there is no temptation to introduce these volatile products. There is a general Statute in Maryland fixing the Fire Test of oils at not less than 110 degrees F. Tagliabue Open Tester, while in Baltimore City there is a special ordinance providing for 120 degrees F. Flash Test, equivalent to 150 Fire Test by the same Tester. There is no provision for enforcing the State Law. The number of persons using the lower test is many times greater than those using the higher test oil, but an accident from explosion is practically unknown, and this affiant asserts that from his experience and
60 observations the residents of the State of Maryland at large are better off with no enforceable inspection law than the citizens of Baltimore City with an ordinance requiring all oils of a higher Test than is sold throughout the State.

In the testing of oils generally in commercial transactions throughout the United States a simple form of apparatus to determine the Flash and Fire Tests is used, known as the Tagliabus Open Cup, which is inexpensive, and results generally concordant for all commercial purposes are obtained by its use. An unskilled man might report incorrect results, but hardly any instrument can be devised that is proof against ignorance. In States where the laws require the use of a different form of Open Tester or Closed Tester, Oil Refiners and Oil Exchange grade their produsts as to Fire Tests by this simple instrument.

That this affiant, while engaged in making tests for the Baltimore and Ohio Railroad Company had some years of experience with the use of the "Elliott Closed Cup" and is also familiar from Refining work with other cups. 100 Flash Test by the Elliott Cup is equivalent to 130 Flash Test by the Tagliabue Cup. In his experience more errors and greater discrepancies have resulted from the use of the "Closed Cups" than from the "Open Cups." The reason for this is quite apparent after consideration; Barometric conditions should be allowed for in each case, but a greater difference is caused

in closed cups than in open cups. If the test flame is allowed to approach too closely the surface of the oil or remain too long in the neighborhood of the oil, a greater error is caused in a closed cup than in an open one, as the circulation from the top to the bottom in both cups is determined by the rate of cooling at the top, a small area of overheated oil in the open cup is soon cooled by contact with the air, and sinks to the bottom; while in a closed cup every effort is made *ot* prevent this cooling effect at the surface it being understood, of course, that hot oil is lighter than cooler
61 oil and tends to stay at the surface. Furthermore, if slight errors of manipulation cause the test flame in the closed cup to be brought too close, or the flame itself is too large, each application of such a flame gives rise to the formation of a slight excess of vapor, the total of which accumulates in the closed cups, and forms a flashing mixture, which indicates a flash less than the true flash of the oil. The Barometric changes in the case of the open cup make so little difference in the "flash" and "fire point" that no provision has ever been made to his knowledge in any specifications or laws, to take care of slight differences that would naturally result from different atmospheric pressures. In the closed cup, however, these differences due to atmospheric pressures are so great that corrections have to be made, and are of such a nature that Barometer readings and the correctness of the same enter largely into any discussion or controversy that arises over any oils tested by the Closed Cups.

To summarize the differences in manipulation of the two kinds of cups; in the open cup the following points only need to be kept in mind in making a test.

1st. Size and shape of cup.
2nd. Protection against draughts.
3rd. Regularity of Heating.
4th. Approximate size of Test Flame and regularity of application.

In the closed cups all of the above precautions have to be taken into consideration, with the following additions:

5th. Initial temperature of Oil before starting test.
6th. Barometric conditions.
7th. Humidity.

And to repeat the conclusion, errors in a closed cup, one way or the other, result as an accumulation of slight differences, while in an open cup, each application of the test is practically independent of every other application and condition of test. This has been
62 unconsciously recognized by the makers of closed cups who have attempted by means of the automatic introduction of the test flame, electric sparks, etc., to reduce the error inherent in the instrument.

The danger from explosion does not proceed from coal oil used in the lamp so much as from the lamp itself and the use of an improper wick or burner. The amount of light *b*iven by an oil is not dependent upon its Flash Point, Gravity or any set of simple physical conditions. By the additions of Naphtha or gasolene to a Cylinder oil of 600 Degrees F. Fire Test one could easily prepare an

oil of low flash and fire tests, but which would not burn in the ordinary lamp. All experts and investigators upon this subject agree that it is not the oil but the vapor produced that burns, and that such oil is safest that produces combustible vapor with the least amount of heat for its generation, it being evident that a high fire test oil will always require a greater amount of heat to vaporize it; such heat will communicate through the burner and font of the lamp to the oil contained and produce a vapor therein that will by mingling with the air contained in the font of the lamp produce an explosive compound which will not be the case with oil that volatilizes at a less degree of heat, provided the test of the oil is high enough so that volatilization does not take place at ordinary temperatures, which would be safely fixed at 110 Degrees F. Fire Test by the Tagliabue Open Tester.

Affiant further says that in the burning of any lamp, explosive mixtures theoretically occur, at some moment in every burning of the lamp, but that in low flash oils that explosive mixture is quickly reached and passes while in high test oils it is more slowly reached and more slowly passes, and in the case of the high test oil, the explosive mixture remains with attendant increased heating of lamp and burner than in case of low test oil.

63 Sir William Thompson (Lord Kelvin), the eminent scientist states as the result of exhaustive experiments that the conditions necessary to bring about the explosion in an oil lamp, occur only once in ten million times during which a lamp is burning.

The investigations upon this subject have been epitomized in the Chemical Technology, (Groves and Thorp) in the article on "Petroleum Industry and Lamps." This includes a review of the work of Dr. Chandler and Dr. Peckham of this country, working for the U. S. Government; Sir Fredierick Abel and Boverton Redwood, working for Great Britain; Dr. Fock working for the German Standards Commission.

Later work has also been published in the Journal of Industrial and Engineering Chemistry, June 1909. All of these investigators agree that with the ordinary form of lamp there is always at some period in its burning an explosive mixture of oil vapor and air in the font of the lamp, using any of the Burning Oils of Commerce. The only means of safety is by the use of such a wick and burner that the vapor in the font is never exposed to flame.

That in making luminosity tests of various grades of oil for the Baltimore and Ohio Railroad Company using a photometer to measure the light and an automatic balance that weighed the oil as consume-, his conclusions from a large number of tests and from innumerable independent tests and conference- with the Petroleum expert of the United States Geological Survey, Dr. David T. Day are as follows:

1st. An oil of highest Flash and Fire Test, (300 D. F. Fire) is the most expensive per unit of weight per unit of light.

2nd. This element of expense per unit of weight, decreases as

the Fire Point diminishes, until we reach a minimum point, some where between 110 d. F. Point, and 130 d. F. Fire Point.

3rd. The element of expense, which includes the element of danger is very largely influe*dnce* by the charring and gumming of the wick, which charring and gumming is greater in general for a high test oil than a low test oil.

WILLIAM B. D. PENNIMAN.

64 Sworn to and subscribed before me on the 24th day of July, 1909. My commission expires on the first Monday in May, 1910.

[SEAL.]

A. W. BOWLING,
Notary Public.

65 *Affidavit of Henry Froehling for Complainant.*

Filed July 31, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott., A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. H. Shuford, and A. Cannon, Defendants.

STATE OF VIRGINIA,
City of Richmond, To wit:

Before the undersigned, a Notary Public, duly commissioned and qualified in and for the City and State aforesaid, personally appeared Henry Froehling, who being first duly sworn, on his oath says, that he holds the degree of M. D. College Physician and Surgeon of Baltimore, Maryland, that he has carried on the business as Analytical Chemist in Baltimore from 1870 to 1881, and in Richmond from 1881 to 1903, under the firm name of Doctor Henry Froehling, and since then under the firm name of Froehling and Robertson. That some twenty-five years ago he had occasion to make a large number of experiments for the purpose of ascertaining the explosibility of kerosene oil in ordinary burning lamps; that during the course of these experiments he tried by several methods to induce an explosion in the reservoir of the lamps, that in no case was he able to produce an explosion sufficient to shatter the bowls of the glass lamps; and affiant further says, theoretically, of course, a mixture of the vapor of kerosene oil and air in certain proportions is an explosive mixture, but that his experiments have led him to believe that under ordinary burning conditions this explosive mixture is not produced; and affiant further says that it is his deliberate judgment that practically all so called lamp explosions

if fully investigated, would be found to be due not to an explosion at all but to some accident to the lamp itself, and further this affiant saith not.

HENRY FROEHLING.

66 Sworn to and subscribed before me this 26th day of July, 1909. My Commission expires on the 28th day of April, 1912.

[SEAL.] LOUIS E. WEITZEL,
Notary Public.

67 *Affidavit of W. H. Fensenfeld for Complainant.*

Filed July 31st, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,

vs.

THE BOARD OF AGRICULTURE and W. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Affidavit.

W. H. Fensenfeld being duly sworn deposes and says that he is the President of the Red "C" Oil Manufacturing Company, and has been for six years, prior to which he was Secretary and Treasurer of said Company *hor* six years, and has been identified with the Company continuously for twenty-three years; that during the whole of this period he has been studying the manufacture and sale of oil in all of its various branches; that the Red "C" Oil Manufacturing Company is an independent oil company and has no connection, affiliation or relation with the Standard Oil Company, nor makes any purchases from said Standard Oil Company, or from its affiliated branches; that the affiant is also the president of an oil refining corporation which refines oil, and as such, he is familiar
68 with oils and with the products of crude petroleum; that as the president of the Red "C" Oil Manufacturing Company he was present during the session of the General Assembly in North Carolina before and at the time of the adoption of the oil inspection act; that he attended the meetings of the Finance Committee, to which the bill was referred, and heard the discussions there and in the House, and that said discussions, in large part, consisted in statements that the bill for consideration would largely augment the revenue of the State; that particularly he recalls that Mr. Bowie of Ashe County, in his speech on the final passage of the bill through

the House of Representatives, declared that he had statements from treasurers of many States which show that the oil inspection acts of those States is a source of great revenue to the State, and Representative Doughton of Allegheny, in the course of his speech supporing the bill, declared that the pending bill would bring at least $30,000.00 per year net revenue into the State treasury; that the minority report of the Finance Committee, upon which report the General Assembly acted contained the following: "Many of the States not only protect the people in the matter of lights, but receive considerable revenue from the inspection. Ohio for six months, from June 1st to December 1st, 1908, received $53,815.00; Tennessee in 1908 received $54,550.00; Georgia for 1907 received $14,976.23; that Representative Stubbs of Martin, in opposing the bill, declared that he did so because it was apparent the bill was designed to secure revenue and such was unconstitutional, and while affiant did not hear the debate in the Senate, he is informed and believes
that like positions were taken in that branch of the General
69 Assembly; that it was freely stated by supporters of the bill
that oil was no longer dangerous; that under Section 58 of the Revenue Act of the General Assembly, in the session of 1909, the taxes levied on dealers in oil, which, according to past experiences in the State under a like act, would turn into the treasury about $10,000.00 per year; that said section of the Revenue Act did not affect the Red "C" Oil Manufacturing Company, nor any other independent oil company, because they did not do the amount of business in the State, provided in said act, for taxation; that the present act, if enforced, and if as much oil is sold under said act as has heretofore been sold in the State, will produce an income of $52,000.00 per year, and that the inspection provided for under the rules and regulations of the Department of Agriculture will not necessitate the use of half of this sum;

That affiant is familiar with the statutes existing in various States of the United States, regulating the inspection and sale of illuminating oil; that in each of said States where such acts exist, the act itself prescribes the standard and does not leave the fixing of the standard to any board or body or appointee of the Legislature; that inspection laws exist in 35 States and the Standard fixed in no one of the States is as high as that fixed by the Board of Agriculture of North Carolina, except in the States of Georgia, Iowa, New York, South Dakota and Wyoming; that of the 35 States having inspection laws, 24 States use the Tagialue tester, which is an open tester, and oil when tested by it, flashes at an average of 27 degrees less than when tested by the close testers, and about 30 degrees less than
by the Elliott close tester, so that, applying the test adopted
70 by the Board of Agriculture to Tagiabue tests, the equivalent
would be 130 degrees flash test Taglaibue, and 160 degrees fire test Tagliabue, reduced, therefore, to fire test equivalent, the other States are much lower, as the following table approximately exhibits:

Arkansas	130	Missouri	160
Colorado	110	Minnesota	120
Connecticut	140	New Hampshire	120
Delaware	115	New Mexico	125
Idaho	120	Oklahoma	140
Illinois	150	Pennsylvania	110
Indiana	145	Rhode Island	110
Kentucky	130	Tennessee	145
Louisiana	150	Utah	110
Maine	110	Vermont	110
Maryland	110	Washington	120
Massachusetts	110	Wisconsin	120

That most of the acts in the various States having inspection laws were adopted many years ago and were passed on the then current belief that illumination oils were explosive. At the time of the adoption of some of the acts, oil did contain a large quantity of naptha, and the earlier acts, in express terms, prohibited the mixing of napthas with illuminating oil. In the early days of the development of the petroleum industry, the napthas were of little value and were allowed to remain in the illuminating oil and sold as illuminating oil. It was the napthas that were dangerous and explosive. The census reports of the United States show that in 1880 illuminating oil constituted 84.3 per cent of the value of the crude oil, while naptha and gasoline constituted only 6.8 per
71 cent. In 1904 the percentage in value of illuminating oil had fallen to 52.2 per cent, while that of naptha and gasoline had risen to 12.2 per cent. From 1880 to 1904 the quantity of illuminating oil increased 146.6 per cent and its value 148 per cent, while during the same period, the quantity of naptha and gasoline increased 286.8 per cent and the value 619.7 per cent. The census figures likewise show that the value of all by-products of crude petroleum have increased from 15.7 per cent in 1880 to 47.8 per cent in 1904. That these figures show that the refiners are taking all of the naptha from the crude oil by reason of the fact that the value thereof is greatly in excess of the value of illuminating oil, and they likewise show that the other ingredients of crude oil have been extracted from it for other purposes, and thereby leave the illuminating oil for commerce pure, freer from danger and from unnecessary and injurious substances year by year; that the explosive and dangerous elements of crude oil are the napthas and when these are taken out of the crude oil, the danger ceases;

That neither the flash nor the fire test of oil bears any relation to luminosity, but it is a fact generally, that the luminosity of oils of low test is greater than for oils of high test, as it is always the vapor of the oil that burns and not the oil itself, and the more freely it vaporizes, the more freely does it burn, and the less apt is it to char the wick and prevent the flow of the oil to the flame; that since it is the vapor which burns, when this vapor is produced at a low degree of heat, the lamp does not become so hot and is less likely to produce an explosive mixture than when burning a high test oil; that on this point, affiant agrees in opinion with Groves & Thorpe in

their work entitled "Chemical Technology." Vol. 2, page 287, on the subject of light, where they say:

72 "If the flashing point of the oil used be below the minimum fixed by law (73 degrees Abel test) (equivalent to 110 degrees Tagliabue fire test), vapour will be given off comparatively freely, but the mixture of petroleum-vapour and air formed in the upper part of the reservoir of the lamp will probably be feebly explosive in consequence of the presence of an excess of the vapour. On the other hand, if the flashing point of the oil be comparatively high the vapour will be less readily or copiously produced, and the mixture of the vapour and air may be more violently explosive, because the proportion of the former to the latter is likely to be lower, and nearer that demanded for the production of a powerfully explosive mixture * * *. Experiments have demonstrated that the burning of an oil of comparatively high flashing point is more likely to cause heating of the lamp than the use of an oil of comparatively low flashing point, in consequence of the higher temperature developed by the former, and of the greater difficulty with which some oils of that description are conveyed to the flame by the wick. It therefore follows that safety in the use of mineral oil lamps is not to be secured simply by the employment of oils of comparatively high flashing point, and that the use of such oils may even in certain cases give rise to dangers which are small, if not entirely absent, with oils of comparatively low flashing point."

That affiant has sought the opinion of eminent scientists and practical oil manufacturers who have devoted many years to the investigation of oils, and who inform him that in their experiments they have found it practically impossible to explode a lamp burn-

73 ing the ordinary illuminating oil, and without exception, so far as this affiant's investigations have gone, and he has constantly, for many years, been investigating the matter, explosions of lamps from the oil in the lamp, do not occur—that when accidents do occur in the use of lamps investigation shows that they are due to improper care of the lamps, unfit burners, and to allowing the wick to become filthy and charred and oil to gather on the outside of the lamp which conditions are in no way dependent upon whether the oil is of low or high test:

That throughout the commercial world, and in transportation as well, burning oils are no where put down as explosive, but invariably are put under the head of inflammable material. In the rules of the American Railway Association for the Transportation of explosive and inflammable articles, and acids, issued June, 1909, regulation 1801 is as follows:

"Inflammable Liquids: This group includes any material, compound, or mixture, that gives off inflammab*el* vapours (as determined by flash point Tagliabue's Open Cup Tester, as used for test of burning oils) at or below a temperature of 80 degrees F."

That the United States Government has made no publications upon the subject of the inflammability of petroleum oils and has made no regulations concerning same, except for the transportation thereof, and Section 4472 of the Revised Statutes

of the United States even permits the transportation on passenger steamers of refined petroleum which will not ignite at a temperature less than 110 degrees Fahrenheit, fire test, Tagliabue open tester, which is 50 degrees lower than the test required by the North Carolina Board of Agriculture:

That there are no practical tests for determining luminosity
74 of oil, the apparatus for this purpose and methods used requiring a great expenditure of time and being applicable only to the *ap*rticular oil examined, and with reference to the character of lamp and chimney used when the examination is made; that testing for illuminating quality is not in use generally, either in the United States, or foreign countries, and there are no specifications provided for the luminosity of oil in all the oil shipped abroad from this country, and it is estimated that 65 per cent of the oil refined in this country is shipped abroad; that the United States Government, through the Secretary of the Interior, on May 11th, 1908, in a communication to Congress, declared that the illuminating power of an illuminating oil does not depend solely upon its composition, but more particularly upon the construction of the lamp and chimney used to determine the illuminating power; that as above stated, the lower test oils have generally greater luminosity than higher test oils; that in a report of the General oil Inspector of the State of Georgia, dated November 1st, 1904, he says:

"Many of our people are strongly of the Opinion that an oil which falls below the limit prescribed by law is a poor oil in the sense that it will not give a good light. This opinion is incorrect and an unsafe oil need not necessarily be a poor illuminator, and generally is not * * *. In the recent oil investigation, I examined some oils which were undoubtedly unsafe and below the law, but yet when I burned them day after day, in a properly cared for lamp, no fault
could be found with the light they *fave*. Because a lamp gives
75 a poor light is no evidence that the oil is unsafe." That the test required in the State of Georgia, and under which oils would be rejected as unsafe, is above the test in twenty-nine of the other States of the Union.

That illuminating oils have never to the knowledge and belief of affiant been adulterated, and they contain no objectionable substances that can possibly be eliminated, all of the substances of crude petroleum, except what is essential for illumination, being extracted and sold in other forms, most of them being many times more valuable in other forms than they would be contained in illuminating oils;

That up until 1900, fully 80 per cent of the crude oil produced in the United States was what is known as "Pennsylvania crude," derived from the oil fields of the Appalachians, but since that time, oil wells have been developed in many sections of the country and there are now on the market of the country, at least from twenty to thirty crude petroleums, each differing in chemical composition from the other, and each differing in price and each of which produces varying percentages of illuminating oil, which illuminating oil, at the same flash or fire test, may and generally does produce

different degrees of luminosity, which can be determined beforehand by no examination, and which can only be tested by actual experience in the use by each individual using it; that it is possible to produce illuminating oils of high test, but in order to do so, large expense has to be incurred because the remnant left after extracting the high test oil differs in chemical composition from the ordinary remnant and the production of high test oil displaces the arrangement for producing the valuable by-products which have become a large part of the production of oil refiners; that in
76 order to furnish oil to the consumers in North Carolina, under the regulations prescribed by the Board of Agriculture the oil will have to be sold to the local dealers at a higher price and at a still higher price by the local dealers to the consumers, probably resulting in raising the price to consumers at least five cents per gallon, which, upon the quantity of oil heretofore consumed in the State, would amount approximately to $500,000.00 per annum; that this is not only the anticipated effect of the statute, but it is in harmony with the experience of many States which have adopted oil inspection acts, and it will be more marked in this State by reason of the higher test adopted by the Board of Agriculture; that the price of oil in Tennessee, under the operation of the inspection act, averages approximately to the dealer, three cents per gallon higher than in the State of North Carolina without any inspection, and this is likewise true of the prices in the State of Georgia, as compared with those in the State of North Carolina; that the inspection laws in other States, by increasing the difficulties of the independent companies in competing with the Standard Oil Company, have driven them from business in those states, this being true in Georgia and Tennessee in reference to the trade of the complainant, the Red "C" Oil Manufacturing Company, and of the Chas. H. Moore Oil Company of the State of Ohio, who have withdrawn from the State of Tennessee for reasons above stated; that the difficulties under the act of the Legislature of North Carolina will be intensified in one direction, to-wit: by the very much hi*ht*er test required, and since the independent companies are largely dependent upon refineries not controlled by them for their oil, it will be with great difficulty that they can procure the
77 oil necessary to meet the regulations and requirements of the Board of Agriculture in the State of North Carolina, and may result in driving them entirely from the field; that affiant has had tested a number of samples of oil sold in Georgia and Tennessee, under their existing inspection laws, and has found by actual test that they did not come up in luminosity to the standard of the lowest grades of oil sold in North Carolina without inspection, and affiant avers that, taken all together, the oil sold in the State of North Carolina without inspection, is fully equal to that sold in the other states after inspection, and he further distinctly avers that there has not come to his knowledge a single instance in the past twenty years where there has been a lamp explosion from the use of coal oil in the State of North Carolina, during all of which time affiant's company has been doing business in the State, and affiant personally,

each year, visited the State in the interest of his business, and has talked with many people in various parts of the State in reference to oil, its danger, luminosity, and the result of its qualities.

Affiant further states that he is chairman of committee on oil inspection of the National Petroleum Association, a body corporate, composed of nearly all the independent refiners, and many independent jobbers of oil, in the United States; that in such capacity he has appeared before a number of legislative committees in various States and has ascertained that oil inspection legislation was contemplated because of the assumption that increase in test of oil would improve burning quality and would provide revenue for the State, and that in the States of Maryland, Virginia, and South Carolina, such proposed legislation was defeated after investigation into the true facts; that in 1907 he appeared before a legislative
78 committee at Harrisburg, Penn., in opposition to a bill to increase the fees of inspection, and that an offer of $1,000.00 in cash was made by a representative of one oil company to any one who could adduce evidence of authenticated case of lamp explosion within the last twenty years; affiant believes and avers that the existing law passed in 1872 would have been repealed at that session but that such action would have legislated out of office the oil inspectors, all of whom were present during the legislative session, urging the continuance of the law;

Affiant further states that complaints have been made to him at various times by independent refiners and jobbers of coal oil of the persecutions they have suffered by reason of unjust condemnation of oil which, upon investigation in courts or by civil authorities, have been shown of full test required by law, and that damage to their reputation has been suffered thereby, and that the trade has been influenced thereby to purchase oil from the Standard Oil Company, at the instigation of whose employees such condemnation had been secured; that many of such cases were cited in the investigation of the Interstate Commerce Commission and Bureau of Corporations, Department of Commerce and Labor, and in the recent trial of the United States to dissolve the Standard Oil Company.

Affiant further states that during the consideration of the bill enacted by the North Carolina Legislature it was freely admitted by members of the Legislature that there had been no complaint of oil sold in the State having been unsafe, nor was there any instance of accident from use of oil or lamp explosion cited or adduced at any of the hearings; that the safety of oil was admitted as a matter of common knowledge.

79 Affiant further avers that the Elliott tester is not in commercial use. A number of independent refiners do not possess such tester and it is not regarded as producing the actual flash test of oil, for the reason that as the light taper is inserted within the opening at various times during the process of testing, and the surface of the oil is thereby heated without affecting the thermometer, the bulb of which is below the surface of the oil, the result of test is varied according to the size and frequently with which it approaches the surface of the oil. Experts agree that

there is an average difference of approximately 30 degrees in the test of oil when tested by open and close testers, and in a letter which affiant received from Dr. W. S. Straton, Director of Bureau of Standards, Department of Commerce and Labor, under date of July 23, 1909, he states that investigations made show an average difference of 27 degrees Fahrenheit between the open and close tests; that from same letter affiant is informed and avers that the average flash test for France, Great Britain, Germany, Russia, Sweden and Canada is 79.5 degrees Fahrenheit, close test, the highest being France, 95 degrees, and the lowest, Germany, 69.8 degrees; that affiant hereto attaches a table showing the flash and fire point and apparatus used in the various countries of the world, outside of the United States, the test in said countries being made by the Abel tester, which is a close tester, 73 degrees Abel equaling about 87 degrees Tagliabue.

Affiant further states that the said Red "C" Oil manufacturing Company is now under contract for delivery of coal oil to all departments in the District of Columbia, and that the specifications
under which such contracts were let, provided for the testing
80 of oil by the Tagliabue tester, which tester is commonly
used throughout all departments of the United States Government, except for experimental work in the geological department, in which case the Abel tester is used, which facts were ascertained after personal investigation by the affiant.

W. H. FEHSENFELD.

Subscribed and sworn to before me this the 30th day of July, 1909.

GEO. L. TONNOFFSKI,
Deputy Clerk of U. S. Court.

81 *Table of Flash and Fire Points.*

Country.	Temperature specified by law — flash fire.	Kind of test. Open or closed.	Apparatus.	Date of law.	Remarks.
Great Britain ..	100D F..	Open	.....	1868 1871	Law of 1879 was considered a more exact statement of 1868 and 1871.
" " ..	73D	Closed	Abel	1879	
Australia	73D	Closed	Abel-Pensky	1904	May be raised to 80D F.
New Zealand...	110D	Open	.....	1882	
Austria	70D	Closed	Abel.	1901	
Barbados	83D	Closed	Abel.	1903	
Belgium	.....	.....	.....	....	Local reg.
Bermuda	73D	.....	Abel.	1887	
Br. Honduras..	100D	Open	.....	1878	
Canada..	95D	Closed	.....	1886	Test point lowered due to agitation.
"	90D	"	.....	1893	
"	83D	"	.....	1894	
"	85D	"	Abel	1899	
"	250D	Open	.....	1886	For fuel.
"	180D	"	.....	1893	For fuel.
"	145D	"	.....	1894	For fuel outdoors.
Ceylon	73D	Closed	.....	1896	Dangerous below 76D cargo must average 73D with none below 70D.
Denmark	104D	.....	.....	....	Restrictions on storage of oil of less than 104D.
"	73D	.....	Abel.	1887	Proposed bill but withdrawn.
"	73D	Closed	Abel.	1903	Restrictions on use and storage of oil less than 73D.
Dominica	100D	.....	Abel.	1874	
France.....	95D	Closed	Granier....	1873	Oil under 95D used under restrictions, also storage regulations.
Switzerland....	.....	.....	.....	....	Local reg.
Lucerne.....	73	Closed	Abel	1903	Zurich is similar.
Germany	.....	Closed	Abel-Pensky	....	Local reg.
Berlin.	69.8....	Closed	"	1883	Restrictions as to storage and use, especially for oil under 69.8.
Bremen..	100	Closed	Abel-Pensky	1872	Similar to Berlin.
82 Hamburg	69.8....	Closed	Abel-Pensky	1882	Similar to Berlin.
Gibraltar	73	Closed	Abel "	1884	
Holland	.....	.....	Abel.	1901	Local regulations except for transportation where oil over 69.8 is especially provided for.
Rotterdam.....	69.8....	Closed	Abel-Pensky	1902	
India.....	100	Open	.....	1865	
"	73	Closed	Abel.	1871	
"	73	"	Abel-Pensky	1886 and 1890 1899	See also Ceylon. Storage and safe regulations "Dangerous Petroleum"—Flash below 76 F.
Italy	.....	.....	....	....	Local regulations except for shipping; no national tests.
Rome	75	Not prescribed.			
Jamaica	95	Closed	Abel	1903	

Table of Flash and Fire Points—Continued.

Country.	Temperature specified by law — flash fire.	Kind of test. Open or closed.	Apparatus.	Date of law.	Remarks.
Japan.....	86	Closed		1882	New legislation contemplated.
Norway.....	95	.....	.....	1871	See France.
"	120	Not prescribed.		1879	
"	71.6....	Closed	Abel	1890	See France.
Russia.....	82.4 ...	Closed	Abel-Pensky	1891	Restrictions on sale and storage.
Russia.....	28.4....	Open	.....	....	For steam-raising purposes.
Sierra Leone...	95	Open	.....	1899	Importation prohibited for oil less than 95.
Spain.....	No test.				
Sweden.....	71.6....	Closed	Abel.	1885	Similar to Norway but was 95 before 1885.

83 *Affidavit of C. D. Chamberlin for Complainant.*

Filed July 31, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,

vs.

THE BOARD OF AGRICULTURE and W. A. GRAHAM and Others.

Affidavit.

C. D. Chamberlin being duly sworn deposes and says that he is the General Secretary and Administrative officer of the National Petroleum Association, a corporation including in its membership most of the independent refiners in the United States and a large number of jobbers in oil; that he has held such position for the last four years, prior to which he was interested in the manufacture and refining of oil, and had been since the year 1884, and is conversant with the methods of refining and the business of marketing petroleum and its products; that from his general information he knows that the volatile portions of crude petroleum are of such greater value than such portion as is used for illuminating purposes; that the usual processes of refining, at the present time, provides for a complete separation of the volatile from the illuminating portions of petroleum, to obtain which the process of refining is briefly as follows:

The crude oil is placed in a receptacle called a still, to which heat is applied. The vapours arising therefrom are conveyed through condensing apparatus to other receptables in a fluid condition. The volatile portions are separated from the other portions by use of the Baume Hydrometer, which indicates the gravity of the distillate

formed. After the volatile portions are thus separated by distillation, the distillates used for illuminating purposes, are collected in the receptacle so long as they are fit for illumination, the heavier distillates following being used for other purposes. This illuminating distillate is generally placed in what is known as a steam still, which is heated by steam more slowly and drives off any possible residue of volatile fluid, which it is to the advantage of the
84 refiner to procure on account of its greater value. As refining is a separation by fractionation of the crude petroleum, any distillate can be again separated into its light and heavier portions as the crude was originally, but for all practical purposes, the present process of refining illuminating oil deprives it of any of the volatile portions of the fluid.

Affiant states that the practical refining of oil differs from the usual determinations by lab-atory experiments in that the boiling points are not recognized, and to affiant's knowledge from practical experience, chemists are of little value in the practical refining of oil until they have learned the business from a practical standpoint; that the method of re-separation of remaining volatile fluids in the illuminating oil by use of the steal still, takes the place of what was formerly the practice of raising oils to any desired test by blowing air through them, thus throwing the vapours of the volatile portions off into the air, and that this method has been abandoned as too expensive.

Affiant further states that as an officer of the National Petroleum Association he has had occasion very frequently to appear before Legislative Committees having under consideration the question of the formulation of laws looking to the inspection of oil, and that in no instance, to his knowledge, has the question of danger to the consuming public been raised, the only question actuating such legislation being either the securing of additional revenue for the State, or the enlargement of political jobs by the creation of additional oil inspectors, or by increasing the fees therefor.

Affiant further states that to his knowledge, illuminating oil is not and cannot be adulterated advantageously to the manufacturer; that more depends upon the burner and chimney and the composition of the wick, as well as the depth of the bowl of the lamp, in securing maximum illumination, than depends upon the oil; that a wick composed of short fibre, or too closely woven, will not produce a good light; that the only test of illuminating oil practically made use of by the refiners is the ordinary household lamp, and that no other test of illuminating oil is practicable; that in making tests of oil the Foster cup is regarded as most accurate because
85 it is automatic, but the Tagliabue open tester is in most general use; that the Elliott tester is now used in only five States, its use having been discontinued in the States of Wisconsin and Michigan, and the Tagliabue open tester substituted in its place; that the Elliott tester is not regarded as accurate and is not made use of by refiners of oil, or by the United States Government, or by any foreign countries.

Affiant further states that it is his belief from a full investigation

of this question and from his general knowledge acquired in course of his work, that no law regulating the inspection of ill nating oil is necessary; that he is supported in such belief resolution unanimously adopted by the National Petroleum Ass tion at its annual meeting at Atlantic City, N. J. October 15, 1 which was as follows:

"Whereas, Refined Petroleum, otherwise known as coal oil, ca oil and kerosene oil, has, for years been known by oil refi experts and chemists to be non-explosive, due to the elimin therefrom of the volatile products, on account of the greater v

And Whereas the flash test and fire test of said illuminating oi not indicate their burning quality, or candle power;

And Whereas, inspection laws now in force are unnecessar protecting the public against danger, are expensive and burden to both dealer and consumer, and embar-ass and handicap the of Independent Oils,

Therefore be it resolved, that the National Petroleum Associa does oppose the enactment of any oil inspection legislation, as fi a standard of flash or fire test and fees for testing and inspe thereunder, and that it shall diligently endeavor to secure the r of such existing inspection laws."

Affiant further says that he has frequently been appealed t aid in securing the repeal of inspection laws which were wor prejudice to the interests of independent refiners and distribu of oil on account of agents of the Standard Oil Company, in c sion with the inspectors, in having oil which was of legal tes jected, causing them loss of sales and discrediting them with trade and entailing upon them the burdens of litigation; that he not known of any instance in which such rejected oil has bee inspected by competent persons but that it has proved to be o

required legal test, and further that the testing of oil
86 matter that never is done with exactness, but with app
mating results only are obtained, which approximation vary according to the person so testing, and his experience and as there are many conditions, barometric and otherwise, as we difference in thermometers and construction and use of instrum

Affiant further says that in all his experience he has never kn of a single explosion of oil in a lamp and has read the pape Sir William Thompson (Lord Kelvin) in which he states: "I h like many others, endeavored to produce, under ordinary condit an explosion in a paraffin oil lamp, sufficient to shatter the recept but have always *fil*aed."

Affiant states that of the total amount of oil refined in the Un States, fully 65 per cent is exported to foreign countries, the ave test of which is about 73 degrees Abel; that should the same stan of test be adopted by all the States of the United States as proposed by the Board of Agriculture of North Carolina, enough oil could not be produced under the present produc of crude oil in the United States, to supply the demand for illuminating oil.

C. D. CHAMBERLI

Subscribed and sworn to before me this the 30th day of July, 1909.

[SEAL.] GEO. L. TONNOFFSKI,
Dep. Cl'k U. S. Courts.

87 *Affidavit of H. L. Finlayson for Complainant.*

Filed August 2, 1909.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

In Equity.

THE RED "C" OIL MFG. CO.
vs.
THE BOARD OF AGRICULTURE, W. A. GRAHAM, et al.

Affidavit.

H. L. Finlayson being duly sworn states that he has had many year's experience in the sale of oil and is now Secretary and Treasurer of National Oil Company, an independent oil company; that he is familiar with the prices of oil, and has been for the last twenty years. The price of illuminating oil has continually declined since 1888 on account of the gas being extracted, and now the jobbers' price in Eastern North Carolina runs from 10 to 10½ cents per gallon; in the west and center the price is some higher on account of freight rate.

H. L. FINLAYSON.

Subscribed and sworn to before me this the 2 day of August, 1909.

[SEAL.] H. L. GRANT, *Clerk.*

88 *Affidavits of W. A. Withers and Others for Defendants.*

Filed July 29, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Affidavit.

W. A. Withers being duly sworn testifies that:

1. He is now, and for several years has been Professor of Chemis-

try in the N. C. College of Agriculture and Mechanic Arts, and that he is Vice President of the Association of Official Agriculture Chemists of the United States;

2. He has made experiments with illuminating oils while a student at Cornell University, and since that time as a professional chemist and has given instruction to his students in regard to illuminating oils:

Manufacture of Illuminating Oils.

3. Illuminating oils are prepared from petroleum by distillation and other methods of refining. The crude oil is placed in a still and heated. The more volatile portion, which we may call the gasoline distillate, passes over first. The maximum temperature for collecting this distillate may vary, but 150 degrees C. may be placed as approximately the average. The next portion to distill over is call- illuminating oil. The maximum temperature at which this fraction is collected varies, but 300 degrees C. may be taken as approximating the average. If we take the illuminating oil fraction which distilled between the temperature of 150 degrees C. and 300 degrees C., and distill it again, we shall find that some of it
89 passes over below 150 degrees C., and that when the temperature of 300 degrees is reached there will be an undistilled residue. The low distilling portion is the source of danger from explosion and may be removed by forcing a current of air through the oil. The removal causes very little loss by weight, greatly increases the safety of the oil and does not diminish its luminosity. The high distilling residue is one of the sources of diminution of the luminosity of the oil.

Testing Oils for Safety.

4. Two general methods for testing the safety of oil are in use, viz., the "flash point" and the "fire test". The "flash point" represents the temperature at which the oil gives off sufficient vapor to form a momentary flash when a small flame is brought near its surface. The "fire test" determines the temperature at which the oil gives off enough vapor to maintain a continuous flame if ignited; in other words, it shows the temperature at which the oil burns in the air, and is higher than the flash point by an average of something like twenty degrees Fahrenheit.

5. Two general forms of apparatus are used in makng the flash test, viz., the open tester and the closed tester. The open tester is the oldest form. Probably the most common form of tester of this class if the Tagliabue cup, which is constructed in a way which makes it very convenient to carry. The Foster cup is one of the more modern testers. It is constructed so that "an orifice around the tube of the thermometer allows a downward current of atmospheric air when the flashing taper is alight". It is therefore in effect an open tester. One of the more common forms of closed tester is the Elliott closed cup, which is prescribed as the official instrument by the North Carolina State Oil Chemist.

Fire Test Versus Flash Test.

6. Explosions are due to the contact of a lighted taper with an admixture of air and of vapor from an illuminating oil. As this vapor is generated at a temperature much below the fire test, many explosions might occur before reaching the temperature of the fire test, hence, in the opinion of the writer, the fire test cannot ve taken as an index of the dangerous qualities of an illuminating
90 oil. In this opinion the affiant is supported by the following well-known authorities:

(*a*) Sadtler (Industrial Organic Chemistry 1895, page 35) says "The danger, of course, begins when an oil will flash, so the flash point is generally taken as the basis of legal prescription. Most European Countries and most of the States of the United States prescribe a flash test."

(*b*) International Library of Technology, (Petroleum and Its Products 1902, p. 6) "In testing illuminating oils, the flashing test is the most important, since it is the explosion of vapors in small quantities that causes most of the accidents. Nearly all our States and foreign Countries have regulations requiring a minimum flashing test."

(*c*) Allen (Commercial Organic Analysis, 1900, page 103) says: "The 'burning point', 'fire test' i. e. temperature at which the oil parmanently inflames—is sometimes taken as a test of quality, but is not reliable."

7. Affiant has not found a single authority expressing a preference for the fire test over the flash test as an index of the safety of an illuminating oil.

Open Testers Versus Closed Testers.

8. If samples of the same oil in an open cup and a closed cup are heated at the same rate, when the temperature is sufficient to give a flash in the closed cup there will be no flash in the open cup at that temperature because a large portion of the vapors have escaped from the open cup into the air. In order to get a flash in the open cup the oil in it must be heated still higher to a temperature such that the vapor will be generated sufficiently rapidly to supply the loss due to escape into the air and to still leave over the surface of the liquid an amount of vapor equal to that which in the closed cup at a lower temperature gives a flash. It is the opinion of
91 the affiant that the closed testor more nearly represents the conditions as they exist in lamps, and that it is a better index to the safety of an oil than the open tester. The open testers being unprotected at the top are influenced by the movement of the air in the room and do not give such accurate and closely agreeing results as closed testers.

9. The affiant has made tests with the Tagliabue and Foster cups, which are open testers, and with the Elliott cup closed, and has found the Elliott cup more accurate, and he is of the opinion that

it more nearly represents actual conditions in the lamp that either the Tagliabue or Foster cup, and he thinks the Board of Agriculture was wise in selecting it as the standard instrument.

10. The following well-known authorities support the opinion of the affiant:

(*a*) Crews (Petroleum, 1886, Page 345) says: "Now the various improvements which have been made in oil testers have had for their object the elimination of all these sources of error which have been pointed out. For instance, Tagliabue's open tester has been largely supplanted by his improved closed apparatus."

(*b*) Sadtler's (Industrial Organic Chemistry, 1895, page 36) in regard to Tagliabue's open cup, says: "Like other open cup apparatus it gave readings which were variable and higher than if the top of the cup were covered."

(c) Thorpe (Industrial Chemistry, 1905, page 312) says: "Open testers do not represent the conditions prevailing in an ordinary lamp: the closed tester more nearly approaches these."

(*d*) Stillman (Engineering Chemistry, 1900, page 395) says: "The instrument that gives the best satisfaction in testing
92 illuminating oils, not lubricating oils, for the flash and fire test, is called the Wisconsin tester." Affiant states that this is practically the Elliott Closed Cup.

(*e*) Author of the International Library of Technology (Petroleum and its Products, 1902, page 6) says: "The two principal divisions under the testers are the closed and open cups. The latter is the cup originally used; but for burning oils, it has been almost superseded by the closed type" and page 6, "One of the closed testers receiving considerable recognition in the various states is the Elliott cup."

(*f*) Allen (Commercial Organic Analysis, vol. 2, part 2, 1900, page 105) says; in reference to open testers, "The method was quite inaccurate and not materially improved by the use of Tagliabue's open tester. The quantity of oil is too small and the open vessel causes loss of vapor."

(Page 108) "As a result of investigations Elliott devised a form of tester which has been highly approved," and (Page 108-109) "This tester (Elliott W. A. W.) is largely used in many laboratories and designated in many official specifications."

(*g*) Gill (Oil Analysis, 1909, Page 15) says of oil testers: "The covered testers are the more Scientific and give more concordant results and should be made the standard instruments" * * * "One of the best forms of testing apparatus is that devised by the Michigan State Board of Health in 1873, modified by Dr. A. H. Elliott and now known as the New York State Board of Health tester." The New York State tester is the Elliott cup.

11. The affiant further states that he has examined carefully the various authorities whose works are in the A. & M. College Library and failed to find a single one that expressed an opinion
93 unfavorable to the Elliott cup or to closed testers.

Directions for the Test by the State Oil Chemist.

12. The affiant has carefully compared the directions prepared by the State Oil Chemist for making the test by the Elliott cup with the directions given in Gill's Oil Analysis, (Pages 16-17) and finds them the same except in the case of two words which do not affect the method in any way. He has also compared these with the language of the circulars sent out by the manufacturers of the instruments and he finds that the slight differences in verbiage in nowise affect the accuracy of the method or the result.

North Carolina Standard for Flashing Point.

13. Affiant has not made any experiments himself as to the difference between the temperature in the lamp and in the room, but from consultation of authorities he is of opinion that the temperature in the bowl of the lamp is higher than the temperature of the air of the room by from 9 to 12 degrees Fahrenheit. An oil with a flashing point of 100 degrees F., Elliott closed cup, according to the North Carolina standard would therefore be safe provided the room temperature did not exceed 88 degrees F. Affiant believes that during the summer time there are days when the temperature of the air in the room during the lamp-burning portion of the days is as high as 88 degrees F, and that a standard good for the entire year should be no less than the North Carolina standard.

Importance of Safety Test to the State.

14. Affiant has tested samples furnished by the State Oil Chemist from oils on sale in the State and has found some which showed a flash point of less than 90 degrees F. by the Elliott closed cup, and less than 100 degrees F. by the Tagliabue cup and the Foster cup. He is of the opinion that the use of such oil in lamps for illuminating purposes is dangerous and should not be permitted.

94 *Importance of Tests of Illuminosity.*

15. Affiant is of opinion that an oil may show a satisfactory test as to safety according to the North Carolina standard and yet be a very poor quality as to luminosity. He is of the opinion that the State Board of Agriculture should require the State Oil Chemist to -ake tests which will show the light-giving qualities of the illuminating oils on sale in the State. These tests may be made by the use of a photometer. There are other tests which may be made which will indicate the light-giving power of oils.

W. A. Withers being duly sworn says, that the foregoing affidavit is true to the best of his knowledge, information and belief.

W. A. WITHERS.

Sworn to and subscribed before me this 28th day of July, 1909.
[SEAL.] E. B. CROW,
Notary Public.

My Commission expires November 29, 1909.

95 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE, and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon.

Affidavit.

E. F. Ladd, being duly sworn, deposes and says that he is the Chemist of the North Dakota Government Agricultural Experiment Station; State Chemist for North Dakota, and Food and Drug Commissioner for the State, and is thoroughly acquainted with the various flashing tests for illuminating oils, having had practical experience along that line for 15 years. That the Elliott Closed Cup is a more accurate test than the open devices or the Foster Cup and should be made the standard. That the open cup devices are not accurate in that they may vary considerably according to where the device is located when the test is made. If in a draught, the vapors are carried away as they are formed, whereas, in an Elliott Closed Cup such cannot be the case as there is no chance for them to be carried away, they accumulating under the closed cup.

E. F. LADD, *Affiant.*

Subscribed and sworn to before me this 24 day of —— 1909.
[SEAL.] W. A. YODER,
Notary Public.

My commission expires December 12, 1914.

96 In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY
vs.
THE BOARD OF AGRICULTURE, and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horn, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Affidavit.

R. E. Stallings being duly sworn deposes and says:

That *je* is chemist for the Agricultural Department of the State of Georgia, and has for 3 years made a study of illuminating oils

and is thoroughly acquainted with said business. That he has tried various methods for testing oils and that he finds the Elliott Closed Cup one of the best, if not the best, and most accurate method now known. That said method is far more accurate than any open cup device could be in that the Elliott Closed Cup retains the vapor- as they are produced, whereas in the open cup the vapors are allowed to float off with the air, thus causing a great inaccuracy when the device is sitting in the slightest breeze.

Affiant further says that oils that will not stand the test of 100 degrees F. in the Elliott Cup are dangerous for use for illuminating purposes.

R. E. STALLINGS, *Affiant.*

Subscribed and sworn to before me, this the 31 day of July, 1909.

[SEAL.] W. H. HARRISON,
Notary Public.

My Commission expires the 15 day of April 1913.

97 *Affidavit.*

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE, and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Asheley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Affidavit.

William Anderson Syme, M. Sc., Ph. D., State Oil Chemist, being duly sworn affirms:

1. That he is a chemist by profession, a graduate of the Agricultural and Mechanical College of North Carolina, and of the Johns Hopkins University of Baltimore, Md.; that he has been actively engaged in practical work in chemistry for ten years since leaving college, including three years in advanced work in Organic Chemistry and Analytical Chemistry at the Johns Hopkins University, where he gave special attention to the analysis of kerosene oils by the latest methods of combustion; that he is acquainted with the nature of kerosene from a chemical point of view, and is familiar with methods of analyzing oils, and has taught the same to students of the A. & M. College of this State.

2. That he has visited the states of Georgia, Tennessee and Ohio, the Bureau of Combustibles of New York City and the Bureau of Chemistry of the U. S. Dep't of Agriculture at Washington, and has investigated the systems of oil inspection and standards in use in those places.

3. That in the light of the information he has acquired by the study of illuminating oils, he has recommended to the Board of Agriculture of North Carolina the adoption of a flash test of not less than one hundred degrees Fahrenheit 100° F., made with the New York State Board of Health Oil Tester, commonly called the Elliott cup, as the standard flash for insuring safety in the use of oil.

98 4. That the Elliott cup is a more scientific and accurate oil tester than the Foster cup or the open Tagliabue cup, for the reason that it shows more exactly the temperature at which the oil begins to give off explosive vapors.

5. That any kerosene oil is dangerous at its flashing temperature, and therefore the flash point of an oil should be higher than any temperature to which the oil is subjected. Since the temperature in the climate of North Carolina often ranges between 90 degrees and one hundred degrees, yo- say nothing of the temperature in the bowl of the lamp, which is often above a hundred degrees, the flash point of the illuminating oil sold in the State should not be less than 100 degrees F.

6. That an oil refined until it flashes at 100 degrees F. in the Elliott Closed cup will not have lost its illuminating power on account of such refinement, but will have lost some of the dangerous and quickly burning constituents.

7. That the writer has made a careful study of the Elliott closed cup in comparison with the Foster cup and with the open Tagliabue cup, these tests having been made with 28 samples of illuminating oils sold in North Carolina. Separate portions of the same sample of oil were carefully tested with each tester. The results of this investigation show conclusively that the Elliott cup is the most truthful and accurate of the three cups. The flashing points of the samples of oil as given by the three cups are submitted herewith in tabulated form, marked "Exhibit A."

8. That the Elliott cup is recognized by the scientific world as a standard instrument of greater accuracy than the Foster cup or the open Tagliabue cup and has been adopted as the standard instrument for oil inspection by the following states: Georgia, Tennessee, Iowa, New York, New Jersey, North Dakota and South Dakota.

9. That other inviestigators of oils have found the Elliott cup more accurate than the Foster and the open Tagliabue cup. Statements to this effect signed by them, reports and chemical journals are submitted herewith, marked "Exhibit B."

10. That an oil may show a very high burning or fire test, and yet be of low flashing point and therefore very unsafe. This
99 is especially the case with oils which consist of a mixture of very heavy and very light hydrocarbons. The more nearly homigeneous an oil is in composition, the closer the flashing and burning points will approach each other. An unsafe oil may be brought up to the legal standard by adding to it a sufficient quantity of heavy lubricating oil, but such a heterogeneous mixture will be of poor quality for illuminating purposes. Hence the necessity for

other tests than the flash and fire tests. The absence of an objectionable proportion of heavy oil, as indicated by a distillation test, and the light giving power of the oil as determined by a photometric test, are most important characteristics in judging the quality of a sample of kerosene.

W. A. SYME.

Subscribed and sworn to before me, this th- 29 day of July, 1909.

[SEAL.] GEO. L. TONNOFFSKI,
Deputy Clerk, United States Circuit Court
for the Eastern District of North Carolina.

100 "EXHIBIT A."

Oil No.	Laboratory No.	Elliott flash.	Tagliabue flash.	Foster flash.
1		100 deg. F.	108 deg. F.	117 d. F.
2		85 " "	.....	100 " "
3		100 " "	107 " "	116½ "
4		99 " "	108 " "	118 "
5		100 " "	108 " "	.....
6	1	114 " "	129 " "	138 "
7	2	104 " "	112 " "	123 "
8	3	92 " "	103 " "	109 "
9	4	100 " "	112 " "	117½ "
10	5	92 " "	108 " "	113 "
11	6	93 " "	107 " "	113 "
12	7	90 " "	102 " "	108 "
13	8	86 " "	104 " "	112 "
14	9	110 " "	130 " "	130 "
15	10	92 " "	104 " "	110 "
16	12	110–112 " "	128 " "	133 "
17	13	112 " "	129 " "	135 "
18	14	88 " "	102 " "	110 "
19	15	90–92 " "	100 " "	109 "
20	16	112 " "	133 " "	140½ "
21	17	90 " "	104 " "	113 "
22	18	92 " "	106 " "	109 "
23	20	110 " "	135 " "	134 "
24	25	107 " "	134 " "	134.5 "
25	29	97 " "	109 " "	.....
26	31	108 " "	132 " "	.....
27	73	85 " "	99 " "	107 "
28	75	109 " "	129 " "	132 "

101 *Opinion of Judge.*

Filed Sept. 7, 1909.

Opinion of Hon. Henry G. Conner, Judge, Filed September 7, 1909.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

In the Circuit Court. In Equity.

THE RED C OIL MANUFACTURING CO.
vs.
THE BOARD OF AGRICULTURE, WILLIAM A. GRAHAM, Coms., & Others.

In this cause, upon filing the bill, a temporary restraining order, enjoining the enforcement of the provisions of the Statute in regard to inspection, but not as to the payment of the tax, was granted, with an order returnable on August 2, 1909 to defendants to show cause why an injunction should not be granted to the hearing.

Aycock & Winston for Complainant. R. H. Battle & Son and T. W. Bickett, Attorney General, for Defendants.

CONNOR (District Judge):

Complainant seeks to enjoin the enforcement of the provisions of an Act of the General Assembly of North Carolina, entitled "An Act to provide for the inspection of illuminating oils and other fluids" ratified March 8, 1909. The Act provides: "Sec. 1. "That all kerosene, or other illuminating oils, sold or offered for sale in this State, shall be subject to inspection and test to determine the safety and value for illuminating purposes." All manufacturers, wholesalers and jobbers before selling or offering for sale, in this State, any kerosene, or other oil, for illuminating purposes, are re-
102 quired to file with the Commissioner of Agriculture a statement, showing that they desire to do business in the State, and to furnish the name or branch of the oil, or oils, which they desire to sell, with the names and address of the manufacturer, and that such oil will comply with the requirements of the law.

SECTION 2. Power is conferred upon the Commissioner of Agriculture to collect samples of any illuminating oil offered for sale in this State and have the same analyzed. The inspection of oil, as authorized by the Act, is to be made under the direction of the Board of Agriculture, which is authorized "To make all necessary rules and regulations for the inspection of such oil and to adopt standards of safety, purity or absence from objectionable substances and luminosity when not in conflict with this Act and which they may deem necessary to provide the people of the State with satisfactory illuminating oil."

The Board of Agriculture is required to appoint oil inspectors,

not exceeding, in number, one from each Congressional District, whose compensation shall not exceed one thousand dollars a year and expenses. They are given power to examine all barrels, tanks, or other vessels containing kerosene or other illuminating oils, to see that they are properly tagged and shall, as directed, collect and test samples of oil offered for sale in different sections of the State and, when instructed, collect and send samples to the Department of Agriculture for examination.

SECTION 3. "For the purpose of defraying the expenses connected with the inspection, testing and analyzing oils in this State there shall be paid to the Commissioner a charge of one half cent per gallon which payment shall be made before delivery to agents, dealers or consumers in this State." Provision is made for attaching to each barrel, tank, tank car, and other containers, a tag or stamp to be furnished by the Commissioner of Agriculture showing
103 that the tax has been paid. When oil is shipped in tank cars or other large containers, the manufacturer, or jobber shall give notice to the Commissioner of Agriculture of every shipment, with the name and address of the person, company or corporation to whom it is sent, and the number of gallons on the day the shipment is made.

SECTION 4. "All moneys received under the provisions of this Act shall be paid into the State Treasury and kept as a distinct fund to be styled 'The Oil Inspection Fund.' All checks or orders in payment for tags or stamps shall be made payable to the State Treasurer. The Commissioner of Agriculture is authorized to draw out of said fund, upon his warrant, such sums as may be necessary to pay all expenses incurred in connection with this Act including salary to oil chemist, or chemists, cost of inspection, blanks," etc.

SECTION 5. The State Treasurer shall, on the first day of June and December of each year "turn into the general fund of the State all moneys of the oil fun- in his hand in excess of the amount drawn out by the Commissioner of Agriculture for expenses."

SECTION 6. The Commissioner of Agriculture is required to include in his report to the General Assembly an account of the operations and expenses under the Act.

SECTION 7. Provides: that, whenever complaint is made to the Department of Agriculture in regard to the illuminating qualities of any oil sold in this State the Commissioner shall cause a sample of said oil, or oils complained of, to be procured and have the same thoroughly analyzed and tested as to safety and illuminating qualities. If such analysis, or other tests, shall show that the oil is either unsafe or of inferior illuminating quality, its sale shall be forbidden and report of the result, or results, shall be sent to the party
104 making the complaint and to the manufacturer of such oil.

The remaining Sections prescribe penalties for violation of the provisions of the law. The Act went into effect July 1, 1909.

On the 9th day of March 1909, the General Assembly passed an Act entitled "An Act to suspend the collection of taxes under Section 58 of the Revenue Act because of the higher taxes imposed by the Oil Inspection Act which was ratified on the 8th day of March

1909." This Act contained the following Preamble: "Whereas, since the passage and ratification of the Act to raise revenue at the present Session of the General Assembly, a law has been passed providing for the inspection of illuminating oils and for the imposition of an inspection tax of one half cent per gallon thereon; and whereas the said tax is much greater than the tax imposed under Section 58 of the Revenue Act; and whereas it is not the purpose of the General Assembly that the said taxes shall be cumulative: Now therefore: It is enacted, That the tax imposed under Section 58 of the Revenue Act be suspended and not collected from any person, dealer or corporation paying the tax imposed under the Inspection Law." This Act contains a proviso that if the inspection Act should be held invalid, Section 58 should remain in full force and effect. It is alleged that, under a similar provision in the Revenue Law, in force prior to 1909, the tax levied upon oil companies, confined to such as sold more than $25,000 in value of oil, yielded about $10,000 annually. The complainant did not sell a sufficient quantity of oil, in this State, to subject it to the provision of this Act.

Pursuant to the provisions of the Act, the Board of Agriculture prescribed a form of "A Statement" to be filed by every person, company or corporation, desiring to sell, or offer for sale, illuminating oil in this State setting forth—the name or brand of oil—flash test—by whom manufactured—a stipulation that the oil or oils sold shall comply with the requirements of the Act and regulations of the Board of Agriculture. The Board adopted the following rules:

"There shall be placed upon each tank car, vessel, barrel or other container of illuminating oil, offered for sale in this State, the name under which it is sold, the name of the manufacturer or wholesale dealer, flash test of said oil, date when filled; and when a barrel or other container is filled from a tank car, or other large container, the number of said tank car, or other large container; also tax stamp as required by Section 3 Ch. 554 Laws of 1909."

"The flash test of illuminating oils shall not be less than one hundred and five (105) Fa-renheit, as tested by the Elliott method, according to directions prepared by the State Chemist."

Shipments by carloads of oil in barrels or vessels, or other small containers shall be reported to the Commissioner, as required for shipment in tank cars or other large containers by Section 4 of the Act.

The Oil Chemist is required to analyze such samples as are deemed necessary to ascertain purity and luminosity and report to the Board of Agriculture. The Board elected ten oil inspectors for a term of one year. Each inspector is required to examine all tanks, cars, barrels, vessels, cans or other containers found in his district to see that they are properly tagged and to collect samples as directed and send same to the Department for analysis by the oil chemist. The compansation of each inspector is fixed at $3 per day and actual expenses while at work.

"All kerosene, or other oils usually used for illuminating purposes offered for sale or sold in this State for other use, shall have plainly

marked on the container in letters at least two inches long, or plainly printed on a tag attached thereto: "Not for illuminating pur-
106 poses—Dangerous." Such oil is not subject to inspection. Using or selling it for illuminating purposes is declared to be a *li*olation of Section 8 of the Act.

"The Commissioner, with the approval of the oil Committee, may suspend or change any of the regulations, until the ensuing meeting of the Board."

The Complainant alleges: That it is a corporation duly created and organized under the General Laws of the State of Maryland, authorized to purchase, sell and otherwise dispose of petroleum and the by-products thereof, in the State of Maryland and elsewhere in the United States that pursuant to its corporate powers, it is and has been, for several years engaged in buying and selling petroleum oil and the products and by-products thereof in the State of North Carolina and other States. That, for the purpose of conducting its trade and business in said State it is engaged in shipping over the railroads and other transportation lines, extending from the State of Maryland, and other States, into North Carolina, large quantities of illuminating oil and other *por*ducts and by-products of petroleum. That it has been, for several years, engaged in the manufacture of kerosene oil, for illuminating purposes, in the State of Maryland, and shipping and selling the same in North Carolina and intends to continue to manufacture and ship oil and other *por*ducts of petroleum into the State of North Carolina to meet the demand of its present and increasing trade. That it has invested in its business and plant—building, machinery and material—a large capital—exceeding one hundred thousand dollars. Complainant further alleges that the Commissioner of Agriculture, pursuant to the power vested in him by the said Act of the General Assembly and the Rules and Regulations made by the defendant Board of Agriculture, threatens to enforce the provisions of said Act, unless it complies therewith by paying the tax imposed and other-
107 wise obeying and complying with said Rules etc. That he threatens to institute prosecution against complainant, its agents and servants, for the recovery of the penalties and to declare the forfeiture prescribed in said Act for a failure to comply therewith. That, unless restrained by the Court, the Commissioner will proceed to enforce said Act and the Rules and Regulations, thereby subjecting complainant to a multiplicity of suits, seriously interfering with its business and otherwise subjecting it to irreparable injury.

Complainant alleges that the said Act, in many respects, all of which are ful,y set forth, violates the provisions of the Constitution of the United States and the Fourteenth Amendment thereto, in that:

Kerosene oil, as now manufactured and sold, is not a proper subject of inspection—that it is not, in its use, dangerous to life or property and that, it is impossible, by any practical test, otherwise than by use, to ascertain its illuminating power.

That, not being a proper subject of inspection under the police

power vested in the State, the attempt to subject it to such inspection and to impose an inspection tax, is an interference with interstate commerce and is oppressive and injurious to complainant. That the Act itself, and especially the Rules and Regulations adopted by the Board of Agriculture, are unreasonable, unjust and deprive the complainant of its right-, privileges and immunities secured to it by the Constitution of the United States and the Amendments thereto. That the standard of safety fixed by the Board is unreasonably high, the method of testing the oil is unscientific and impracticable. That the rules and regulations prescribed for administering the law unjustly discriminate against complainant, and other independent dealer-, and give to the Standard Oil Company unfair and
108 unjust advantages in the sale of oil in this State.

That the tax of one half cent per gallon is largely in excess of the cost of inspection and that, as appears from the language of the Act, the history of its enactment, and extrinsic evidence, introduced by complainant, it is shown that it was not intended and, is not in fact, an inspection law but was intended, by the legislature, to be, and is, a measure for raising revenue, violating Art. I Sec. 8 and Art. I Sec. 10 of the Constitution of the United States.

That the Statute violates the Constitution of North Carolina, Art. II, Sec. 1 in that, it confers upon the Board of Agriculture, legislative power. The defendants deny each and every one of the allegations, upon the truth of which the prayer for relief is bases.

The disposition of the first contention involves an enquiry representing the character, extent of, and limitations upon the police power, as it is related to, or affected by, the power conferred upon Congress to regulate interstate commerce. It was held in the Slaughter House Case, 16 Wall. 36 "*taht* the Fourteenth Amendment did not interfere with the exercise of the police power by the States." Guthrie's Fourteenth Amendment 77. It is conceded that all of the kerosene oil sold and used in this State is manufacture-, or is the product of crude petroleum brought in from other States. It is conceded that unless the inspection of illuminating oils can be sustained as a valid exercise of the police power it violates Art. I Sec. 8 of the Federal Constitution. It therefore becomes necessary to dispose of that question at the thresh-old of the discussion. No question of discrimination is presented. While it is not easy to define, and fix the limits, upon, the police power, it is sufficient, for the purpose of this discussion, to say that: "It includes the power of the
109 State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, originally and always belonging to the States not surrendered by them to the General Government, nor directly restrained by the Constitution of the United States." Leisy v. Hardin, 135 U. S. 100. Mr. Justice Day in McLean v. Denver & Rio Grand- R. R., 203 U. S. 38, after referring to the Constitutional provision conferring upon Congress the exclusive power to regulate interstate commerce, says: "While this is true it is equally well settled that a State, or Territory, for the same reasons, in the exercise of the police power may make rules and regulation-, not conflicting

with the legislation of Congress upon the same subject, and not amounting to regulation of interstate commerce. * * * A State or Territory has the right to legislate for the safety and welfare of its people, and this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress or is an attempt to regulate interstate commerce." It is not suggested that Congress has legislated upon the subject. In Patapsco Guano Co. v. No. Ca. Board of Agriculture, 171 U. S. 345, it is held that "Whenever inspection laws act on a subject, before it became an articles of commerce, they are confessedly valid and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self-protection, commonly called the police power. No doubt can be entertained of this when the inspection is manifestly intended and calculated in good faith to protect the public health, the public morals or the public safety. And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally."

110 Mr. Guthrie, as the result of a careful examination of the decided cases, thus states the limitations on the police power: "In considering the validity of an enactment of a State legislature, under the police power, the enquiry is whether the regulation or classification has been designed to subserve some reasonable public purpose, or is a mere device, or excuse for an unjust discrimination or for the oppression or spoliation of a particular class. Any regulation of the internal affairs of the State fairly subserving a valid police purpose and reasonably exercised for the benefit of the community at large, will be upheld, but if it be arbitrary and have no substantial relation to the health, morals, peace or welfare of the community, it will be nullified. No precise limits, however, should be placed upon the police power of the State, for no one can foresee what regulation the welfare of the community may require." Fourteenth Amendment 74-75; Hawker v. New York, 170 U. S. 192.

In Patapsco Guano Co. v. Board of Agriculture, *supra*, the Court sustained an Act providing for the inspection of Commercial Fertilizers sold or shipped into the State. Mr. Chief Justice Fuller said: "Inspection laws are not in themselves regulations of commerce and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them or determin*gin* their fitness, for domestic use and, in so doing, protecting the citizen from fraud. Necessarily in the latter aspect, such laws are applicable to articles imported into as well as articles produced within a State."

In Asbell v. Kansas, 209 U. S. 251, discussing an Act requiring the inspection of cattle brought into the State, Mr. Justice Moody said: "The statute before us is an inspection law and nothing

111 else, it excludes only cattle found to be diseases and, in the absence of controlling legislation by Congress, it is clearly within the authority of the State, even though it may have an inci-

dental and indirect effect upon commerce between the States." Mr. Justice Day in McLean v. Denver & Rio Grande R. R., *supra,* discussing the same question in regard to a law providing for the inspection of hides, says: "It is true that it affects interstate commerce but we do not think such was its primary purpose and, while it may have an effect upon this *calss* of property, the main purpose evidently was to protect the people against fraud and wrong."

In Oil Co. v. Craine, 209 U. S. 211, it appeared that the oil inspection law of Tennessee imposed an inspection tax upon oil brought into the State and stored for shipment to other States. The Oil Company, insisting that such oil was the subject of interstate commerce sought to enjoin the collection of the tax. While the questions presented in this case were not discussed or decided in the opinion, many of the *reasons* here assigned for attacking it were pressed by counsel in the brief filed in that case. The Act was sustained. There is no suggestion, in the opinion, that it was not valid as a police regulation. The power of the State to enforce inspection laws in the exercise of the police power is discussed in Plumley v. Mass., 155 U. S. 461; Schollenberger v. Penna., 171 U. S. 1, wherein restrictive legislation in regard to the introduction and sale of Oleo-margarine was involved. In Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159 the Oklahoma oil inspection law was attacked. Mr. Justice White said: "We think the Court below was clearly right in deciding that, as the subject was within the police power of the State, it was not within the province of the judiciary to disregard the Statute and treat it as void, upon the theory that the legislature had acted unwisely in fixing the standard which the statute prescirbed."

112 Complainant insists that if it be conceded that, under conditions formerly existing, kerosene oil, by reason of the explosive fluids, naptha, gasoline, left in it, when offered for sale, at the present time such conditions do not exist; that they are so completely eliminated from the oil that there is no danger of explosion. In support of this contention it alleges in the bill and, reads affidavits made by persons having scientific knowledge, training and experience to show that formerly the value of naptha, gasoline was very small, not so great as the kerosene oil. That now, and for some time past, their value has increased very much and is much greater than the oil. That refiners now take all of the naptha out of the crude petroleum by a process which is explained in the affidavits; that, by reason of this condition the danger to life and property from explosion of illuminating oil or vapors generated in its use "has been reduced to a minimum and there is, at this time, no danger whatever from the use of kerosene oil." Defendants say that while "it is true that a part of the explosive product and by-products of crude petroleum are of greater commercial value than kerosene or other illuminating oil, they aver that there is enough explosive substance left in the oil to make it dangerous to life and property and this is *whoen* by the fact that the more progressive and intelligent States in the Union have, upon their statute books, oil inspection laws similar to the law of North Carolina." De-

fendants read, in support of their contention, the affidavits of the State Oil Chemist and of Dr. Withers the Professor of Chemistry at the State Agricultural and Mechanical College, who say that they have made a study of the subject and have had training and experience in analyzing and testing illuminating oils. They give it as their opinion and that of other eminent chemists, whose writings they quote, that the illuminating oil sold in the markets
113 of this State is sometimes dangerous. Prof. Withers says: "Affiant has tested samples furnished by the State Oil Chemist from oils on sale in this State and has found some which showed a flash point of less than 90 degrees F. by the Elliott closed cup and less than 100 degrees F. by the Tagliabule cup and the Foster cup. He is of the opinion that the use of such oil in lamps, for illuminating purposes is dangerous and should not be permitted." He is "also of the opinion that the State Board of Agriculture should require the State Oil Chemist to make tests which will show the light giving qualities of the illuminating oils on sale in this State. These tests may be made by the use of a photometer. There are other tests which may be made which will indicate the light giving power." Prof. Syme says that he has visited the States of Georgia, Tennessee and Ohio, the Bureau of Combustibles of New York City and Bureau of Chemistry of the United States Department of Agriculture at Washington and has investigated the systems of oil inspection and standards in use in those places. That in the light of the information he has acquired by the study of illuminating oils he has recommended to the Board of Agriculture the adoption of a flash test of not less than 100 degrees Farenheit made with the New York State Board of Health Tester, commonly called the Elliott cup, or the Standard Flach, for insuring the safety in the use of oils." He also gives it as his opinion that the standard adopted by the Board is as low as it should be in this climate. It appears from the affidavits and exhibits that in thirty five states of the Union, including the State of Maryland, oil inspection laws are in force. That in almost, if not in quite all the countries of Europe, and in Canada, New Zealand, Australia and Japan similar laws are in force. The Standards and methods of testing the oils vary.
114 The Elliott cup is used in only five States in the Union.

Assuming that, under ordinary conditions, kerosene oil is a proper subject for the operation of the Inspection Laws, not conflicting with the right of Congress to regulate interstate commerce, has complainants shown that, by reason of the condition alleged to exist, the naptha and gasoline in crude petroleum are so thoroughly and perfectly eliminated by distillation, refinement or other process as to render the oil harmless and remove it from the domain of such legislation by the State in the exercise of the police power? It is well settled that while the power to enact such laws and to say what articles of commerce shall be brought within their provisions is primarily vested in the legislature the ultimate decision of the question whether, in a given case the sale or use of the article bears any reasonable relation to the public morals, health or safety, is vested in the Courts. "The Courts are not bound by mere forms,

nor are they to be misled by mere pretences. They are at liberty—indeed under a solemn duty—to look at the substance of things whenever they enter upon the enquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge and give effect to the Constitution. "Mulger v. Kansas, 123 U. S. 661 and Minn. v. Barber, 136 U. S. 313. Whether, in passing a statute in the exercise of the police power, the legislature has exceeded its constitutional limitations and deprived the citizen of his constitutional right is, of necessity, a judicial question—if it were not so constitutional limitations would be of no validity, the legislative will,
115 not the constitution, would be "the supreme law of the land."

This is elementary and has long since passed beyond the domain of debate. It is equally elementary, and equally essential to the practical working of a government of defined, distributed powers, that "In determining whether the legislature, in a particular enactment, has exceeded the limits of its constitutional authority every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. It is a well settled rule of constitutional exposition that if a statute may or may not be, according to the circumstances, within the limits of legislative authority the existence of the circumstances necessary to support it must be presumed." Harlan, J. in Sweet v. Retchell, 159 U. S. 280. The latest expression of the Supreme Court is from Mr. Justice Moody in Knoxville v. Water Co., 212 U. S. 1. The City of Knoxville fixed rates to be charged by the Water Co. Claiming that they were confiscatory, the Company applied to the Circuit Court for an injunction restraining their enforcement. The learned Justice said: "There can, at this day, be no doubt that the Courts, on constitutional grounds, may exercise the power of refusing to enforce *el*gislation, nor, on the other hand, that the power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest and, when that invalidity rests upon disputed question of fact, the invalidating facts must be proven to the satisfaction of the Court. * * * Nothing less than this is demanded by the respect due from the judicial to the legislative authority." Mr. Justice Peckham in Wilcox v. Gas Co., 212 U. S. 19, in which the validity of rates was brought into question, said: "The case must be a clear one before the Court ought to be asked to interfere with State Legislation upon the subject of rates, especially before there has been any actual experience of the practical results
116 of such rates." Mr. Justice Harlan in Plumley v. Mass., *supra*, said: "The judiciary of the United States should not strike down a legislative enactment of a State especially if it has direct connection with the Social order, the health and the morals of the people—unless such legislation plainly and palpably violates some right granted or secured to the National Constitution or en-

croaches upon the authority delegated to the United States for the attainment of objects of national concern." In considering this aspect of the bill the allegations in regard to the "Rules and Regulations" adopted by the Board of Agriculture—the standard of safety —the instrument and method adopted for testing the oils and their effect upon complainant's constitutional rights are treated as part of the Act. Complainant's is made of the standard—it is said that it is unreasonably high—that it will be very difficult for independent companies to procure the oil necessary to meet the regulations and *acc*quirements of the Board—that they may result in driving them out of the State, thus giving to the Standard Oil Company a monopoly in the sale of oil in the State—that in order to furnish oil to the consumers in North Carolina, under the rules and regulations prescribed the oil will cost them a much higher price—probably as much as five cents a gallon more than is now charged, which will entail an expense of five hundred thousand dollars upon the people. It is sufficient to say that no one, or all, of these matters can affect the decision of the question whether the statute, together with the rules and regulations as applied to the conditions existing in this State, is within the legislative police power? If, as it alleges, the standard of safety fixed is unreasonably high or the method of testing the oil unsatisfactory and not such as are in general use or the regulations, in other respects, unjust or oppressive, it should
117 seek relief by applying to the Board of Agriculture to modify them. The Court can not declare a law invalid because, in its opinion, it does not accord with sound policy or justice—the appeal for redress must be made to the law making power? "The Courts have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body." St. Louis & Iron Mt. Ry. v. Taylor, 210 U. S. 281. It is not claimed that the rules and regulations are prohibitory. If their enforcement will add very largely to the cost of the oil to be paid by the consumer—this does not affect any constitutional right of complainant. While there is much diversity of opinion in respect to the danger of explosion from the use of kerosene oil and of the power to ascertain its illumination capacity, it is evident that the question has not so far passed beyond the domain of debate, that the legislature may not subject it to reasonable inspection before permitting its sale in the State. The Court cannot say that such a law has no reasonable relation to the public safety or welfare. In its domicile of origin and of residence complainant's product is subjected to an inspection law fixing standards and tests, differing, it is true, from those established in this State. A careful analysis of the Act and rules and regulations established for its administration shows that it conforms to the standard fixed by the Courts for the validity of such legislation. "The particular exercise of the police power must tend, in a degree that is perceptible, to secure some object of the proper exercise of the police power and the Court must be able to see that the means adopted have a reasonable relation to the end desired." Health Dept. etc. v. Trustee, etc., 145 N. Y. 39. This being so, the Act does not,

upon its face, conflict with the right of Congress to regulate
118 interstate commerce or deprive the complainant of any constitutional right or privilege, or take its property without due process of law.

The complainant further says that the Act violates the Constitution because it imposes an *exciet* or impost tax upon oil shipped into the State. Art. I, Sec. 10 provides: "That no State shall, without the consent of Congress, lay any impost or duty, on any imports or exports, except what may be absolutely necessary for executing its inspection laws." The terms "imports" and "exports," as used in this Section, have been held to refer to such articles as are brought into, or sent out of, the States from, or to, foreign countries. Brown v. Maryland, 12 Wheat. 419; Woodruff v. Parham, 75 U. S. 123. In Pittsburg Coal Co. v. Louisana, 156 U. S. 590, it is said: "The terms "imports" and "exports" apply only to articles imported from foreign countries, or exported to them. The inhibition imposed is the laying of duties on imports from foreign countries and not on such as come from one State to another." While no express prohibition is found in the Constitution against a State laying such duty, or tax, upon an article brought into its borders from a sister State, of necessity it is found in the power conferred upon Congress to regulate interstate commerce because, as said by Judge Marshall "the power to tax is the power to destroy." While, therefore, the State may not tax interstate commerce it may, in the exercise of its reserve police power impose such a reasonable charge or tax as is necessary to execute its inspection laws. It is said by Mr. Justice Bradley in Neilson v. Garza, 2 Woods (C. C.) 287, "The right to make inspection laws is not granted to Congress, but is reserved to the States; but it is subject to the paramount right of

Congress to regulate commerce with foreign Nations and
119 among the States; and, if any State, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such duty is void, if it exceeds what is absolutely necessary for executing such inspection laws." This case is cited, and the language quoted with approval, in Patapsco Guano Co. v. Board of Agriculture, *supra*. Thus, the limitation upon the amount of a tax imposed by an inspection law upon an article which is the subject of interstate commerce is the same as that fixed by the Constitution in Art. I Sec. 10 upon "imports." If an excessive inspection tax is imposed upon an "import," within the meaning of that Section, it is provided that "the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." No such provision being found in Section 8, inhibition can be enforced only by declaring the Statute, imposing the tax, invalid. In the Neilson case, Judge Bradley enquired how the alleged excess is to be determined. After suggesting the difficulties involved in submitting the question to a jury, he concludes: "Then we are brought back to the question whether the law is really an inspection law. If it is, we can not interfere with it on account of

supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with free importation of goods." In the Patapsco Guano case, *supra,* it appears that the legislature passed an act imposing a "license tax of $500." upon dealers in commercial fertilizers, on each separate brand sold, and expressly appropriated large sums, from the proceeds of the tax, to specific objects—the sup-ort of an Industrial Association—the expense of an oyster Survey and the establishment of an Agricultural College. The Act was declared invalid.

Fertilizer Co. v. Board of Agriculture, 43 Fed. Rep. 609
120 (II L. R. A. 179) Seymour, J. Delivering the opinion. He said that, while the Court might judicially take notice of the fact that the amount of the tax was largely in excess of the cost of inspection, it was relieved of "all embarrassment in this respect by the fact that the Act declared by necessary implication that the tax is not needed for inspection expenses." In consequence of this decision, the legislature repealed the invalidating provisions of the Act and enacted a Statute practically the same as Section 3955 of the Rev. (Section 2190 Code 1883) prociding that "For the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing material in this State, there shall be paid to the Commissioner of Agriculture a charge of twenty-five (now twenty) cents per ton on such fertilizers." The proceeds of this tax are directed to be paid in to the State Treasury by the Commissioner of Agriculture and kept on a separate account by the Treasurer as a fund for the exclusive use and benefit of the Department of Agriculture." Rev. Sec. 3937 (Code 1883, 2208). This Act was sustained in an opinion by Seymour, J. in Patapsco Guano Co. v. Board of Agriculture, 52 Fed. Rep. 690. Upon appeal, the judgment was affirm-d, Fuller, C. J. saying that the alleged excessiveness of the tax was only material if "it demonstrates a purpose other than that which the law declared." in discussing the same objection to an inspecti-n law, in McLean v. Denver & Rio Grande R. R., *supra,* it is said: "It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection which goes into the Treasury of the Sanitary Board * * * . The law, being otherwise valid, the amount of th- inspection fee is not a judicial question, it rests with the legislature to fix the amount and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the service rendered as to attack the good faith of the law." The sole
121 ground, therefore, upon which the amount of the inspection tax becomes material, or can be considered by the Court, is to ascertain whether the legislature has acted in good faith—has enacted a statute for the purpose of securing inspection of illuminating oil sold to the people or, whether, under the guise of doing so, it has violated the Constitution and imposed a tax for the purpose of increasing the revenues of the State. In no other aspect is the amount of the tax, as related to the cost of inspection, "a judicial question." Before the Court should find, in the language or in the provisions of a statute, a purpose on the part of the legislature, to

violate the Constitution and nullify the statute otherwise clearly within its power to enact, such unconstitutional purpose should appear beyond any reasonable doubt. The Court will never presume that the legislature intended to violate the Constitution. In the language of Mr. Justice Moody, "Nothing less than this is demanded by the respect due from the judicial to the legislative authority." It will be well to enquire in what manner the Supreme Court has dealt with the question in similar cases. In the Patapsco Guano case, *supra*, Chief Justice Fuller said: "If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge. But, treating the question whether the charge of twenty five cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question, we are satisfied that, comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tage, express charges, miscellaneous expenses of the department in this connection and so on, we can not conclude that the charge is so seriously in excess of what is necessary for the objects designed to be affected, as to justify the imputation
122 of a bad faith and change the character of the Act."

In Western Union Telegraph Co. v. New Hope, 187 U. S. 419 it appeared that the borough had imposed a license tax, to meet the expense of inspection and supervision, upon the poles and wires of the Telegraph, Telephone and Electric Light Companies. In an action to enforce the payment of the tax the Company contended, as here, that the tax was so largely in excess of the cost of inspection and supervision as to show that such was not its real purpose, but that it was intended, and had the effect of, bringing revenue into the Treasury. Upon appeal, Mr. Chief Justice Fuller said: "It is conceded that the borough had the right, in the exercise of its police power, to impose a reasonable license fee upon telegraph poles within its limits and that an ordinance imposing such fee is to be taken as *prima facie* reasonable." In the discussion a number of decisions of the Supreme Court of Pennsylvania are cited—one in which it was conceded that the tax was five times more than the cost of inspection. The Chief Justice concludes; "Concurring in these views, in general, we think it would be going much too far for us to decide that the test set up (the annual cost of inspection) by the plaintiff in error must be necessarily applied and the ordinance held void because of failure to meet it." St. Louis v. Telegraph Co., 148 U. S. 92; 149 U. S. 465. The same principle, to test, was applied in McLean v. Denver & Rio Grande Ry Co., *supra*, the Court saying, "The facts shown do not bring the case within that class which holds that, under the guise of inspection other and different purposes are to be subserved, thus rendering the legislation invalid." In Telephone Co. v. Taylor, 192 U. S. 64 it appeared that a license fee was imposed upon poles and wires to cover cost of inspection and supervision. In an action brought to recover the fee, Mr. Justice Peckham said, "The borough has, in fact,
123 done nothing in the way of inspection or supervision during the time covered by the license in question. It has not

expended one dollar for any such purpose. It has incurred no liability to pay any expenses arising from inspection or supervision on its behalf. The fee itself is twenty times the amount of expense that might have been reasonably and fairly incurred to make the most careful, thorough and efficient inspection and supervision that might have been made of such poles and wires and for all reasonable measures and precautions that possible could be required to be taken by the borough for the safety of its citizens and the public." The opinion concludes, "Judging the intention of the borough by its action it did not intend to expend anything for the inspection *fo* the poles and wires and did intend to raise revenue under the ordinance. This is not the expression of an opinion—it is the averment of a fact.

The distinction between this and the other cases cited is too obvious to require comment. Applying the principle or test, upon which all of the decisions go, to the facts developed in the record, what is the conslusion? There is nothing on the face of the law to show that the tax will yield an amount largely in excess of the cost of inspection—but the bill alleges it will be more than double the amount necessary for the inspection proposed under the statute and regulations, and that defendants estimate that they will be able to turn into the State Treasury annually, after paying all of the expenses at least $20,000. This is denied by the defendants. The only evidence offered to sustain the averment is the affidavit of the President of complainant in which he says, "The present act, if enforced, and if as much oil is sold under said Act as has heretofore been sold in this State, will produce an income of $52,000 per year and that the inspection provided for under the rules and regu-
124 lations of the Department of Agriculture will not necessitate the use of half that sum." At best, this is but the opinion of the President. He does not say what quantity of oil was shipped into the State during the past year nor does he undertake, as probably he could not, by anticipation, say what the cost of inspection will be. There are many items of expense, as enumerated by the Court in the Patapsco Guano case, the character and amount of which can not be anticipated with any reasonable degree of certainty. It is due the Department of Agriculture to assume that a fair trial will be given, the result reported to the General Assembly and, as said by the Chief Justice, if the charge is found excessive, it will be moderated." While the power to enjoin the enforcement of statutes manifestly violative of the Constitution and destructive of the rights of the citizen is clear, it should be exercised with great caution and with due regard to the respect which is due from the judicial to the legislative authority and to the necessity for arresting the enforcement of the law to prevent irreparable injurey. The observations of the Court and the course pursued in the case of Knoxville v. Water Co., *supra*, express clearly the best considered view of the Supreme Court upon this subject. It is an elementary doctrine of equity jurisprudence that an injunction will not be granted unless the facts, upon which the extraordinary relief is demanded, are clearly set forth and sustained. Mere opinion or apprehension of

injury are not sufficient. "A preliminary injunction proceeding on the ground of the invalidity of a statute will not be granted unless it is quite clear that the statute can not stand or that there is great danger of irreparable injury." Ryan v. Williams, 100 Fed. Rep. 177. Any other rule of practice would invite frequent applications to the Courts to enjoin the enforcement of statutes before they had gone into operation, based upon more or less well grounded apprehensions of irreparable injury, resulting in serious dis-
125 turbance of the relations between the different departments of the government and entailing other evils which a due regard to elementary principles would prevent. It appears from an examination of the various oil inspection laws in force in the United States that the charges for inspection vary from one half to one and one half cents per gallon and that in States wherein population and other conditions are similar to those in this State the charge is about the same as that fixed by the Act. The fact that the Statute directs that semi-annually the balance to the credit of the Oil Inspection Fund is to be turned into the general fund does not show that there will be any surplus. It does tend to show that the legislature anticipated that there might be, but experience has demonstrated that an anticipated revenue surplus too frequently exists only in the legislative mind. It is insisted that the passage of the Act of March 9, 1909, suspending the tax imposed upon dealers in oil under Section 58 of the Revenue Law shows that the legislature intended and expected the Act to produce revenue. The recitals and preamble to that Act throw but little light upon this question. It is manifest that the cost of inspection will greatly exceed the amount raised by Section 58, estimated at $10,000—it is equally manifest that the legislature expected the inspection tax to cover the cost of inspection, hence, the recital is entirely consistent with the declaration that the oil inspection law would yield a much larger *sim* than Section 58 of the Revenue Law. It might well be that the legislature did not deem it wise to impose a cumulative tax upon illuminating oil—especially in view of the elementary truth that the consumer pays the tax and that, in consideration of the benefit secured to the people by an inspection of oil used by them the State was willing to surrender a revenue collected under Section 58. Whatever may have been in the legislative mind the passage of the Act of March
126 9th is far from conclusive evidence of a purpose to violate the Constitution, or act in bad faith in the passage of the oil inspection law, and it had no relevancy to the argument for any other purpose.

The complainant insists that its contention in this respect is sustained 1st. By the report made by the minority of the Committee recommending the passage of the Bill saying that "Many of the States not only protect the people in the matter of lights but receive considerable revenue from the inspection"—naming two States. 2nd. That two members *o*r the House, in advocating the passage of the Bill stated that it would yield considerable revenue—one of them estimat*ion* $30,000. That one member, who opposed the Bill urged the same opinion as his reason for thinking that it was unconstitu-

tional. This is stated in the affidavit of the President of complain-t and taken as true. He also says that he is informed and believes that "like positions were taken in the other branch of the General Assembly." In Aldrich v. Williams, 3 How. 9 Taney, C. J. Said: "The judgment of the Court cannot in any degree be influenced by the construction placed by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both Houses and the only mode in which that will is spoken is the Act itself; and we must gather their intention from the language used, comparing it when any ambiguity exists with the law upon the same subject and looking, if necessary, to the public history of the time at which it was passes." In U. S. v. Fre-ght Asso. 166 U. S. 290 (318) the reason of the rule is clearly stated, and its wisdom strongly illustrated, "It is impossible to determine with certainty what construction was put upon an Act by the members of a legislative body that passed it be resorting to the speeches of the individual
127 members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might diff-r from each other—the result being that the only way to const-ue a legislative act is from the language used in the Act and, upon occasion, by a resort to the history of the times when it was passed." It would but invite a Court into a most uncertain and unsatisfactory domain of conjecture to abandon the language of a statute, the meaning of which is free from doubt, to indulge in speculation as to the motives of the members of a legislative body in voting for or against it. To do so would endanger the integrity of the statute law of the State. A careful consideration of the record in the light of well settled principles of constitutional exposition, and well considered authorities, fails to show that the Court should find that the law was not passed in good faith for the purpose explicitly declared both in its title and in its provisions. As shown, this is the test upon which its validity depends.

The last assault made upon the Act, and strongly urged in the argument, is that it is incomplete, indefinite and dependent, for its validity and enforcement, upon the exercises of legislative power conferred upon the Board of Agriculture. It is true that the Act fixes no other standard than that the oil shall be satisfactory in respect to safety and illuminating power, nor does it prescribe any method of testing it for the purpose of ascertaining whether it conforms to the standard in these respects. Power is conferred upon the Board of Agriculture "to make all necessary rules and regulations for the inspection of such oil and to adopt standards of safety and purity." It is said that, until this legislative power is exercised, the Act is incapable of enforcement, that it is a mere legislative declaration of a pur-ose to subject oil to inspection giving the manufacturer no notice of the standard to which its oil must conform, nor the consumer of what he has a right *of* demand. This
128 power, it is urged, is vested exclusively in the legislature and cannot be delegated. Art. II Sec. 1 of the State Constitution

provides that "The legislative authority shall be vested in two distinct branches both dependent on the people"—and Sec. 8 Art. I declares that the legislative, executive and supreme judicial, powers ought to be kept forever separate and distinct. There is nothing in the Federal Constitution which prohibits the legislature of a State from delegating legislative power. In Dreyer V. Illinois, 187 U. S. 71 (81) it is said: "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or, whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination, one way or another, cannot be an element in the enquiry whether due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters of life or liberty." Prentiss v. A. C. L. R. R. Co., 211 U. S. 210 (225). It is insisted that the Court, having jurisdiction of the cause by reason of the diverse citizenship of the parties, must pass upon this question. The Courts of this State have uniformly adhered and given full force and effect to this essentially fundamental principle which separates the functions of the three co-ordinate departments of the government. They have also recognized the practical difficulty of carrying into effect the well settled policy of the State to secure police regulation and protection in regard to many subjects except by the use of commissions and other *quasi* legislative and administrative boards. They have, with practical uniformity sustained statutes, the provisions of which verge very closely upon the line of constitutional inhibition in respect
129 to the delegation of legislative power. While, as shown by many st-ongly reasoned and well sustained cases, cited by counsel, to the contrary, decisions of the Courts of other States are in accord with ours. It is concededly difficult to reconcile many of the decided cases. It is true, as shown by the briefs, that in all of the other States the oil inspection laws fix the standard of safety. It is also true that the fretilizer and cotton seed meal inspection laws in this State fix the standards of purity and fitness for use. In the light of these statutes the attack made upon the Act under consideration, in this respect, is not without force. Many reasons occur to the mind why the legislature deemed it best to leave the fixing of standards and methods of testing oil to an intelligent Board of Agriculture with the aid of chemists and other persons having knowledge and experience in such matters. The sole question, however, for the Court is, whether the Act violates the constitution in this respect. The delegation of power to fix reasonable rates to be charged by common carriers of passengers and freights is found in both Federal and State statutes and sustained by the Courts with full recognition that it is a legislative power? The same is true in regard to rates charged by telegraph, telephone, water companies, electric light companies and all other public utilities. It is said that this legislation is sustained because of the necessity of the case—that it is not practicable for the legislature to fix rates. The answer

to this is found in the fact that in our own, and many other States, the legislature has fixed such rates and the right to do so sustained by the Court. It is said that a standard is fixed by the statutes creating these commissions that the rates are to be "reasonable"—so here the oil is to be "satisfactory" in respect to safety and luminosity. Some of the cases cited may be distinguished, and so *em*, although very much in point, it might be *w*hown are
130 not in harmony with the current of authority. The principle upon which this act may be sustained, is stated, and the applicability illustrated in Butterfield v. Stranahan, 192 U. S. 470. Congress enacted a statute prohibiting the importation of any tea "which is inferior in purity, quality and fitness for consumption to the standards provided by Section 3 of this Act." This Section provided that the Secretary of the Treasury, upon the recommendation of a Board appointed by him should "fix and establish uniform standards of purity, quality and fitness for consumption of all teas" etc. The Act was attacked because it delegated to the Secretary of the Treasury and the Board appointed by him legislative power to fix the standard of teas imported into the country etc. It is stated in the exhaustive briefs filed that the case was the last of a series of cases brought to test the constitutionality of the Act. Mr. Justice White thus states the cont*ue*tion: "That the Act confers authority to establish standards and that such power is legislative and cannot constitutionally be delegated by Congress to administrative officers." He disposes of it by saying: "The claim that the statute commits to the ar*ib*trary discretion of the Secretary of the Treasury the determination of what teas may be imported and therefore in effect vests that official with legislative power is without merit. We are of the opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity or unfit for consumption, or presumably so, because of their inferior quality. This, in effect, was the fixing of a primary standard and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute * * * Congress legislated upon the subject as far as was reasonably practi-
cable and from the necessities of the case, was compelled
131 to leave to an executive official the duty of bringing about the result pointed out by the statute * * * The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment to be honestly exercised and, if that were important, there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting upon him." An act of Congress conferring upon the American Railway Asso. the power to designate to the Interstate Commerce Commission the standard height of draw bars, for freight cars, and as sustained upon the authority of the Buttfield case. It would be difficult to distinguish these cases, in principle, from this. In Isenhour v. State, 157 Ind. 517, a pure *g*ood law conferring upon the State Board of Health the power to "prepare rules regulating standards"

etc. was sustained. See also Union Bridge Co. v. U. S., 204 U. S. 364; State v. Briggs, 45 Oregon 366; Lockes App., 72 Penn. 491. To deny to the Legislature the power to fix the "primary standard" in respect to many of the multitude of subjects coming within the police power, and vesting in commissions and administrative boards or officers the power to work out the details would seriously embarrass the State governments in many of their most important functions. As said by the Editor of American & English Enc. Vol. 6-1022, "A marked tendency appears in the direction of assigning duties heretofore deemed legislative to other bodies; to boards and commissions, to local authorities and especially to the voters." There is a manifest advantage in the course pursued by the legislature in this enactment. The standards fixed in other States vary, and the oil chemists do not agree as to the methods of inspection.

132 Reasonable changes, suggested by experience and larger information, may be made by the Board. In the Buttfield case, *supra* commenting upon the complaint that the rules and regulations made by the Secretary of the Treasury are harsh or unreasonable, it is said that a hearing should have been sought rather than an application to annul the statute. It does not appear in this record that complainant has requested any hearing or submitted any suggestions in regard to the standard fixed by the Board, or the method of testing oil? This course would probably afford relief from any harsh, unjust or *i*ppressive rule, if such has been made, by the Board of Agriculture. It may be that the attempt to confer upon the Commissioner and the Oil Committee power to change the rules is invalid—there is no su-gestion that this is threatened.

Upon a careful consideration of the several grounds upon which the complainant's prayer for injunctive relief is based, in the light of the enlightening arguments and briefs of counsel, no valid cause is seen for enjoining the defendants from proceeding with the enforcement of the Act in accordance with its provisions and the rules and regulations adopted for its administration. As no other relief is asked, the Bill will be dismissed at complainant's cost. It is so ordered.

H. G. CONNER,
U. S. Judge.

133 *Decree Dismissing Bill, &c.*

Filed Sept. 7, 1909.

Circuit Court of the United States, Eastern District of North Carolina. In Equity.

Rule Day, September 6, 1909.

THE RED "C" OIL MANUFACTURING CO.
vs.
THE BOARD OF AGRICULTURE, WILLIAM A. GRAHAM, Com'r, et al.

Final Decree.

This cause coming on to be heard upon a motion for an injunction against the defendants, as prayed for in the Bill, and being heard upon the Bill and answer and affidavits in behalf of both complainant and defendants, and being argued by counsel for the parties, it is now considered and decreed by the Court, that, for the reasons set forth in the opinion herein filed, the complainant is not entitled to the injunction prayed for, and thereupon it is ordered, adjudged and decreed that the restraining order heretofore granted be vacated, the injunction prayed for be refused, and no other relief being asked, that the Bill be dismissed, at the cost of the complainant, and that the defendants recover of the complainant and the surety on its prosecution bond all costs and damages incurred by them in this suit, the same to be found and fixed by the Clerk.

It is further ordered that this decree be enrolled.

HENRY G. CONNOR,
District and Circuit Judge of the Eastern District of North Carolina.

134 *Petition for Appeal and Order Granting Appeal.*

Filed September 30, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Petition for Appeal and Order Granting Appeal.

The above named plaintiff, The Red "C" Oil Manufacturing Company, a corporation, feeling itself aggrieved at the decree filed

and entered on the 7th day of September, 1909, in the above entitled proceeding, doth hereby appeal from the said decree to the Supreme Court of the United States, and it prays that this appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made duly authenticated, may be sent to the Supreme Court of the United States.

C. B. AYCOCK,
R. W. WINSTON,
Attorneys for Plaintiff and Appellant. Raleigh, N. C.

And now, to-wit: September 27th, 1909, it is ordered that the appeal be allowed as prayed for.

H. G. CONNOR,
United States Circuit Judge.

135 *Original Assignment of Errors.*

Filed September 30, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Assignment of Errors.

Now comes the above named complainant, The Red "C" Oil Manufacturing Company, and says that in the record and proceedings in the above entitled matter, there is manifest error in this, to-wit:

(1)

The Circuit Court of the United States, Fourth Circuit, Eastern District of North Carolina, erred in dismissing the said suit and entering a final decree therein in favor of said Board of Agriculture of North Carolina, Wm. A. Graham, Commissioner, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. H. Shuford and A. Cannon, for its costs against the Red "C" Oil Manufacturing Company.

(2)

The said Court erred in holding and deciding that an act of the General Assembly of North Carolina entitled "An act to provide for the inspection of illuminating oils and fluids", ratified 8th day of March, 1909, being Chapter 554 of the Public Laws of 1909, impos-

ing a tax of one half cent per gallon upon all oil sold in this
136 State, for inspection purposes, and subjecting any person violating the provisions of said act to criminal prosecutions and penalties, is not unconstitutional, null and void in that it is repugnant to so much of Section 8 of Article 10 of the Constitution of the United States as provides that, "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes."

(3)

That said Court erred in holding and deciding that said charge is a police regulation and that the Legislature of North Carolina had the power to exact it.

(4)

That the said Court erred in holding and deciding that the said charge or tax is for the purpose of inspection of oil, and, therefore, constitutional; whereas, it should have held that the said tax is for the purposes of revenue as appears not only from the caption of Chapter 441, Laws of 1909, "An Act to suspend the collection of taxes under Section 58 of the Revenue Act because of the higher taxes imposed by the oil inspection act", but also because the oil inspection act, Section 5, Chapter 554, Laws of 1909, expressly provides that the excess, after paying inspection charges, shall be turned into the Treasury of North Carolina, and also from the facts disclosed and equities confessed.

(5)

The said Court erred in holding and deciding that illuminating oil is now, in the light of modern science, and since all napthas and other explosives are extracted therefrom, a dangerous substance and a proper subject for inspection by the State.

137 (6)

The said Court erred in holding and deciding that the said acts of the General Assembly of North Carolina, and the rules and regulations of the Board of Agriculture do not abridge the privileges and immunities of this complainant, and do not deprive it of its property without due process of the law, and do not deny it the equal protection of the laws, contrary to the 14th amendment of the Constitution of the United States.

(7)

That the said Court erred in holding and deciding that the said acts of the General Assembly of North Carolina are not an attempt to confer legislative power upon the Board of Agriculture of said State, and that said acts did not delegate legislative power to said Board, and were not the blending of legislative and supreme judicial powers in a contravention of Section 8, Article 1 of the Constitution of North Carolina, and also of Article 11, Section one of said State Constitution, and of the essential fundamental principle which

separates the functions of the three coördinate departments of the Government.

C. B. AYCOCK,
R. W. WINSTON,
Solicitors for Complainant.

138 *Appeal Bond and Order Approving Same.*

Filed Sept. 30, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant,
vs.
THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants.

Bond.

Know all men by these presents, that we, the Red "C" Oil Manufacturing Company, a corporation of Baltimore, Maryland, and The United States Fidelity & Guaranty Company, a corporation having its principal place of business in the city of Baltimore and State of Maryland, duly incorporated under the laws of said State, for the purpose of making and guaranteeing or becoming surety upon bonds or undertakings required or authorized by law, and duly authorized by the laws of the State of North Carolina to execute this undertaking, as surety, are held and firmly bound unto the above named Board of Agriculture and Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford and A. Cannon, in the penal sum of Five Hundred ($500.00) Dollars, to be paid to the said Board of Agriculture, Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Beldsoe, W. H. Shuford and A. Cannon, for the paying of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents, sealed with our seals and dated the 24th day of September, 1909. Whereas, the above named, The Red "C" Oil Manufacturing Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Eastern District of North Carolina.

139 Now, therefore, the condition of this obligation is such that if the above named The Red "C" Oil Manufacturing Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall

be void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] THE RED "C" OIL MANUFACTURING CO.,
By W. H. FEHSENFELD, *President.*

Attest:

SAM'L F. SANDERS, *Sec'ty.*

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By RICH'D D. LANG,
Vice-President.

Attest:

W. W. SYMMINGTON, [SEAL.]
Ass't Secretary.

Sealed and delivered and taken and acknowledged by The Red "C" Oil Manufacturing Company and The United States Fidelity and Guaranty Company, on this the 24th day of September, 1909, before me.

[SEAL.] GEORGE W. MANLY,
Commissioner of Affidavits for the State of North Carolina in the State of Maryland, Residing at Baltimore City, Maryland.

The foregoing bond is approved this 27th Sept., 1909.

H. G. CONNOR,
U. S. Judge, &c.

140 *Original Citation.*

Filed September 30, 1909.

In the Circuit Court of the United States for the Eastern District of North Carolina. In Equity.

THE RED "C" OIL MANUFACTURING COMPANY, Complainant-Appellant,

vs.

THE BOARD OF AGRICULTURE and WM. A. GRAHAM, H. C. CARTER, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Defendants-Respondents.

UNITED STATES OF AMERICA, *ss:*

To the Board of Agriculture of North Carolina, and Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, D. C., on the 4th day of October, 1909, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the Circuit Court of the United States for the Eastern District of North Carolina, from a final decree signed, filed and entered on the 7th day of September, 1909, in that certain suit pending in equity, wherein the Red "C" Oil Manufacturing Company is complainant and appellant, and you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. G. Connor, United States District and Circuit Judge for the Eastern District of North Carolina, this the 27th day of September, 1909.

H. G. CONNOR,
United States Circuit Judge for the Eastern District of North Carolina.

141 Received copy and acknowledge- service of the within citation, this the 29 day of September, 1909.

I. W. BICKETT,
Att'y-Gen., N. C.,
R. H. BATTLE & SON,
Solicitors for Defendants-Appellees: The Board of Agriculture of North Carolina and Wm. A. Graham, H. C. Carter, K. W. Barnes, Wm. Dunn, Ashley Horne, R. W. Scott, A. T. McCallum, J. P. McRae, Wm. Bledsoe, W. J. Shuford, and A. Cannon.

142 *Order to Transmit Record.*

And thereupon, it is ordered by the court here that a transcript of record and proceedings in the cause aforesaid, together with all things thereunto relating, be transferred to the said Supreme Court of the United States and the same is transmitted accordingly.

Teste:

[Seal United States Circuit Court, Eastern District, N. C.]

H. L. GRANT, *Clerk.*

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

Circuit Court, Fourth Circuit, at Raleigh.

THE RED "C" OIL MANUFACTURING COMPANY
vs.
THE BOARD OF AGRICULTURE, W. A. GRAHAM, et al.

I, H. L. Grant, Clerk of the Circuit Court of the United States of America, of the Fourth Judicial Circuit, in and for the Eastern District of North Carolina, do hereby certify that the foregoing One hundred and forty-two written pages, numbered from 1 to 142, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 30th day of September, A. D. 1909.

[Seal United States Circuit Court, Eastern District N. C.]

H. L. GRANT,
Clerk United States Circuit Court,
Eastern District of North Carolina.

Endorsed on cover: File No. 21,850. E. North Carolina C. C. U. S. Term No. 624. The Red "C" Oil Manufacturing Company, appellant, vs. The Board of Agriculture of North Carolina, William A. Graham, H. C. Carter, et al. Filed October 5th, 1909. File No. 21,850.

7

Office Supreme Court, U. S.
FILED.
DEC 2 1909
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. [redacted] 141

THE RED "C" OIL MANUFACTURING COMPANY,
APPELLANT,

vs.

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, WILLIAM A. GRAHAM, H. C. CARTER, ET AL.

MOTION TO ADVANCE.

C. B. AYCOCK,
R. W. WINSTON,
Solicitors for Appellant.

(21,850)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 624.

THE RED "C" OIL MANUFACTURING COMPANY,
APPELLANT,

vs.

THE BOARD OF AGRICULTURE OF NORTH CAROLINA, WILLIAM A. GRAHAM, H. C. CARTER, ET AL.

MOTION TO ADVANCE.

To the Honorable the Supreme Court of the United States:

The appellant herein, The Red "C" Oil Manufacturing Company, moves the court to advance this cause under Rule 26 of the court, and assigns the following reasons therefor, to wit:

First. Unless this cause is advanced either the appellant, The Red "C" Oil Manufacturing Company, and the other independent oil companies will be forced to pay many thousands of dollars (which they can never recover back), under the guise of an inspection law, or else will be run out of the

State of North Carolina, because of the high taxes imposed and the pains and penalties inflicted by the act, leaving the field open to one corporation only, to wit: The Standard Oil Company.

Second. The bill in equity in this suit attacks the constitutionality of an act of the General Assembly of North Carolina, ratified the 8th day of March, 1909, entitled "An Act to Provide for the Inspection of Illuminating Oils and Fluids." The appellant contends that this act is in no sense a police regulation of the State, but is manifestly an attempt to raise revenue by levying and collecting a tax upon illuminating oils used in said State. This tax is one-half cent per gallon, which, according to the evidence, is about 5 per cent of the selling price of oil in said State, and much more than is necessary for the legitimate purposes of inspection.

Third. The constitutional infirmity of said act appears upon the face of the *act itself*, for in section 5 thereof it is provided, that, "*The State Treasurer shall, on the first day of June and December of each year, turn into the general fund of the State, all moneys of the oil fund in his hands in excess of the amount drawn out by the Commissioner of Agriculture for expenses.*" The character of said legislation is likewise uncovered by an act of the North Carolina Legislature passed on the succeeding day, to wit: March 9, 1909, referring to the act of March 8, 1909, the caption of which latter act is, "An Act to Suspend the Collection of Taxes under Section 58 of the Revenue Act, *Because of the Higher Taxes Imposed by the Oil Inspection Act.*"

Fourth. In all cases in which the intent of a State legislature to over-ride the limitations of the Constitution of the United States upon the power of a State to interfere with interstate commerce, or with any other constitutional limitation, appears from the language of the act itself, not only

have the United States courts, but the State courts as well, been swift to maintain the integrity of the Constitution of the United States. For to permit a State boldly and baldly to provide by an act of its legislature in advance for the covering into the State treasury of all excess of taxes remaining after an inspection of products of another State, will be to invite petty and vexatious tariff legislation to raise revenue, on the part of the various States of the Union, the one against the other.

Fifth. The act under consideration provides for various penalties, pains and punishments for the violation of any of the provisions thereof, or any of the regulations of the Board of Agriculture. One of the rules and regulations of the Board provides for the inspection of oils other than illuminating oil, whereas under the said act of the legislature, there is no pretense whatever that the State Board of Agriculture has any right to inspect or regulate the sale of other oils than illuminating oils.

Sixth. The act in question is so vague and uncertain that it is incapable of enforcement, and it delegates the legislative power and prerogative to the said Board, whereas the same should have been exercised by the legislature itself. This is apparent, because no standard or test is prescribed in the said act. The number of degrees of heat necessary to cause oil to flash is not provided for in said act, but all provisions touching said matter are left entirely to the discretion of the Board of Agriculture. It was conceded upon the argument of this case, and is referred to in the opinion of the learned district and circuit judge herein, *that North Carolina is the only State,* out of about forty, having an oil inspection act which does not provide a definite, certain and determinate test for the safety of its oils.

Wherefore, for the reasons above set forth, and others apparent upon the face of the bill, the appellant herein, The Red "C" Oil Manufacturing Company, humbly and respectfully petitions the court to advance this cause upon the docket so that it may be speedily argued, heard and determined, all of which is respectfully submitted.

C. B. AYCOCK,
R. W. WINSTON,
Solicitors for Appellant.

[Endorsed:] File No. 21,850. Supreme Court U. S. October term, 1909. Term No. 624. The Red "C" Oil Manufacturing Company, appellant, *vs.* The Board of Agriculture of North Carolina *et al.* Motion to advance. Filed December 2, 1909.

Brief of Appellant

Supreme Court of United States

October Term, 1911

No. 141

Office Supreme Court, U. S.
FILED.
DEC 15 1911
JAMES H. McKENNEY,
CLERK

THE RED "C" OIL MANUFACTURING COMPANY,
APPELLANT,

vs.

THE BOARD OF AGRICULTURE OF NORTH CAROLINA,
ET AL., APPELLEES.

CHAS. B. AYCOCK,
ROBERT W. WINSTON,
Solicitors for Appellant.

Brief of Appellant

Supreme Court of United States

October Term, 1911

No. 141

THE RED "C" OIL MANUFACTURING COMPANY,
APPELLANT,

vs.

THE BOARD OF AGRICULTURE OF NORTH CAROLINA,
ET AL., APPELLEES.

CHAS. B. AYCOCK,
ROBERT W. WINSTON,
Solicitors for Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 141.

THE RED "C" OIL MANUFACTURING COMPANY,
APPELLANT,

vs.

THE BOARD OF AGRICULTURE OF NORTH CAROLINA,
ET AL.

BRIEF OF C. B. AYCOCK AND R. W. WINSTON, OF COUNSEL FOR APPELLANT.

This is an appeal from the Circuit Court of the United States for the Eastern District of North Carolina. The suit was brought to test the constitutionality of certain acts of the General Assembly of North Carolina and Rules of Board of Agriculture. The Circuit Court upheld their constitutionality.

On the 8th day of March, 1909, the Legislature of North Carolina passed an act entitled "An Act to Provide for the Inspection of Illuminating Oils and Fluids," as follows:

"The General Assembly of North Carolina do enact:

SECTION 1. That all kerosene or other illuminating oils sold or offered for sale in this State for illuminating purposes shall be subject to inspection and test to determine the safety and value for illuminating purposes. All manufacturers, wholesalers and jobbers, before selling or offering for sale in this State any kerosene or other oil for illuminating purposes, shall file with the Commissioner of Agriculture a statement that they desire to do business in the State, and furnish the name or brand of the oil or oils which it is desired to sell, with the name and address of the manufacturer, and that the oil or oils will comply with the requirements of this act. The Department of Agriculture shall have power at all times and at all places to have collected samples of any illuminating oils offered for sale, and have the same analyzed. The inspection of oils, as authorized in this act, shall be under the direction of the Board of Agriculture, which is authorized to make all necessary rules and regulations for the inspection of such oils and to adopt standards as to

safety, purity or absence from objectionable substances and luminosity, when not in conflict with the provisions of this act they may deem necessary to provide the people of the State with satisfactory illuminating oil.

SEC. 2. The Board of Agriculture shall appoint such number of oil inspectors as will be necessary, not exceeding one for each congressional district, whose compensation shall be fixed by the Board of Agriculture, not to exceed one thousand dollars and expenses each per annum. Each inspector, before entering upon his duties, shall take an oath of office before some person authorized to administer oaths. The inspector shall have power to examine all barrels, tanks or other vessels containing kerosene or other illuminating oils, to see that they are properly tagged as required in this act, and they shall, as directed, collect and test samples of oil offered for sale in different sections of the State, and when instructed collect and send samples to the Department of Agriculture for examination.

SEC. 3. For the purpose of defraying expenses connected with the inspection, testing and analyzing oils in this State, there shall be paid to the Commissioner of Agriculture a charge of one-half cent per gallon, which payment shall be made before delivery to agents, dealers or consumers in this State. Each barrel, tank, tank car or container of oil shall have attached thereto a tag or stamp stating that all charges specified in this section have been paid; and the Commissioner of Agriculture, with the advice and consent of the Board, is hereby empowered to prescribe a form for such tags: *Provided*, that they shall be such as to meet the requirements of the trade in oils, and to adopt such rules and regulations as will insure the enforcement of this law. Where oil is shipped in tank cars or other larger containers, the manufacturer or jobber shall give notice to the Commissioner of Agriculture of every shipment, with the name and address of the person, company or corporation to whom it is sent, and the number of gallons, on the day the shipment is made.

SEC. 4. All moneys received under the provisions of this act shall be paid into the State Treasury and kept as a distinct fund, to be styled "The Oil Inspection Fund." All checks or orders in payment for tags or stamps shall be made payable to the State Treasurer. The Commissioner of Agriculture is authorized to draw out of said fund, upon his warrants, such sums as may be necessary to pay all expenses incurred in connection with this act, including salary of oil chemist or chemists, cost of inspection, tags, blanks, etc.

SEC. 5. The State Treasurer shall, on the first day of June and December each year, turn into the general fund of the State all moneys of the oil fund in his hands in excess of the amount drawn out by the Commissioner of Agriculture for expenses.

SEC. 6. The Commissioner of Agriculture shall include in his report to the General Assembly an account of the operations and expenses under this act.

SEC. 7. Whenever a complaint is made to the Department of Agriculture in regard to the illuminating qualities of any oil sold in this State the Commissioner shall cause a sample of said oil or oils complained of to be procured and have the same thoroughly analyzed and tested as to safety and illuminating qualities. If such analysis or other tests shall show that the oil is either unsafe or of inferior illuminating quality, its sale shall be forbidden and report of the result or results be sent to the party making the complaint and to the manufacturer of said oil.

SEC. 8. Every person who shall fraudulently brand or stamp any package or barrel or other vessel, or use a stamp a second time, or keep any kerosene or other illuminating oil not marked and branded in accordance with the regulations of the Board of Agriculture, or violate any other provisions of this act or any regulation adopted by the Board of Agriculture for its enforcement, shall be guilty of a misdemeanor and fined not less than two hundred dollars ($200.00) for each offense nor more than one thousand dollars ($1,000.00).

SEC. 9. If any person, manufacturer or dealer shall sell or offer for sale in this State any of said illuminating oils and fluids before first having the same labeled and tagged as required by the regulations adopted by the Board of Agriculture, he shall be guilty of a misdemeanor and on conviction be fined not exceeding three hundred dollars ($300.00), and the said oils and fluids be forfeited and sold, and the proceeds thereof go to the common school fund of the State. If any manufacturer or dealer of said illuminating oils or fluids shall, with intent to deceive or defraud, alter or erase the label or tag to indicate a different flash test, gravity or quantity than is indicated by the label or stamp attached to the vessel, he shall on conviction be fined not exceeding fifty dollars ($50.00) for every such offense.

SEC. 10. Any inspector who, while in office, shall be interested, directly or indirectly, in the manufacture or vending of any of the illuminating oils, shall be guilty of a misdemeanor, and on conviction shall be fined not less than three hundred dollars ($300.00).

SEC. 11. All prosecutions for fines and penalties under the provisions of this act shall be by indictment in a court of competent jurisdiction.

SEC. 12. The provisions of this act shall not apply to the retail dealer in oils unless such retail dealer shall sell or offer to sell oils of a manufacturer, wholesaler or jobber who refuses to comply with the provisions of this act.

SEC. 13. This act shall be in force from and after July first, one thousand nine hundred and nine.

Ratified this the 8th day of March, A. D. 1909."

At the same session of the Legislature the following act was passed:

"An Act to Suspend the Collection of Taxes Under Section 58 of the Revenue Act, Because of the Higher Taxes Imposed by the Oil-inspection Act.

WHEREAS, since the passage and ratification of the act to raise revenue at the present session of the General Assembly, a law has been passed providing for the inspection of illuminating oils and for the imposition of an inspection tax of one-half (½) a cent per gallon thereon; and, whereas, the said tax is much greater than the tax imposed under section fifty-eight of the Revenue Act; and, whereas, it is not the purpose of the General Assembly that the said taxes shall be cumulative; now, therefore,

The General Assembly of North Carolina do enact:

SECTION 1. That the tax imposed under section fifty-eight of the act to raise revenue upon dealers in oils shall be suspended and shall not be hereafter collected from any persons, dealers or corporations paying the taxes imposed under the inspection law enacted at the present session of the General Assembly, entitled 'An act to provide for the inspection of illuminating oils and fluids': *Provided, however,* if the said Oil Inspection Act should be held invalid, section fifty-eight, Revenue Act, shall remain in full effect.

SEC. 2. That this act shall be in force from and after its ratification.

Ratified this the 9th day of March, A. D. 1909."

It will be noted that the parent act was ratified on the 8th of March, and the auxiliary act on the 9th of March, 1909. Soon after the ratification of the said acts, the defendants, constituting the Board of Agriculture, took steps to give effect to the same and appointed a number of *oil* inspectors, to wit: one for each congressional district, and adopted the following rules:

"Regulations of the Department of Agriculture Concerning Illuminating Oils and Fluids.

(Chapter 554, Laws 1909.)

1. The statement required of manufacturers and others desiring to sell oil in this State in section one of this Act, shall be in substance as follows:

Commissioner of Agriculture, Raleigh, N. C.:

The ———— desires to sell in North Carolina the following brands of illuminating oil:

1. (Name) —— ——.
2. (Name) —— ——.

Manufactured or sold by —— ——, whose address is —— P. O. ——.

And it is stipulated that said oils shall comply with the requirements of said Chapter 554, Laws 1909, and the regulations of the Board of Agriculture made by authority of said Act.

(Signature) —— ——.

2. There shall be placed upon each tank car before the same is emptied into storage tank or tanks and upon other original packages (where kerosene oil is sold in the original package), the name under which it is sold, the name of the manufacturer or wholesale dealer, date when filled, and when the barrel or other container is filled from a tank car or large container, the number of said tank car or other container; also tax stamp as required in section three of Chapter 554, Laws 1909. But no tax stamp shall be required upon a vessel filled from a container upon which required tax has been paid. All oil, upon inspection, shall show the test as marked upon the container. All tax stamps and statements as required in this section shall be removed from all containers or canceled before refilled.

3. The oil chemist shall analyze such samples as deemed necessary to ascertain safety and objectionable substances, purity and luminosity, and report to the Commissioner of Agriculture any standards he deems advisable to be established in these particulars.

4. By authority of said section there shall be appointed ten inspectors.

5. Each inspector shall examine all tank cars, barrels, drums, cans or other containers found in his district and see that they are properly tagged and collect samples as directed and send to the Department for analysis by the Oil Chemist.

6. Each inspector shall receive three dollars per day and actual expenses while at work.

7. The Commissioner of Agriculture shall have prepared tax stamps of such denominations and in such quantities as may be deemed necessary to execute this act. The Secretary of the Board shall have charge of these stamps and deliver to the Oil Clerk from time to time such amounts as will be necessary to supply the demand, and shall make settlement quarterly of the amounts of tags disposed of.

8. All kerosene or other oils usually used for illuminating purposes offered for sale or sold in this State for other use shall have plainly marked on the container in letters at least two inches high, or plainly printed on a tag attached thereto, "Not for Illuminating Purposes—Highly Inflammable." Such oil is not subject to taxation. Using or selling it for illuminating purposes shall be a violation of the section 8 of the act.

9. Shipment by car load of oil in barrels, drums or other containers shall be reported to the Commissioner as is required for

shipment in tank cars, or other large containers, by Section 4, Chapter 554, Laws 1909.

10. No person shall offer to a common carrier for shipment empty barrels used for illuminating oils, upon which the tax stamps have not been canceled.

11. All oil on hand in this State July first prox. shall be subject to the tax of one-half cent per gallon, but shall not be rejected for sale under this act prior to October 1st, 1909, provided its fire test is not lower than 120 degrees Fahrenheit.

12. The flash test of illuminating oils shall not be less than 100 degrees Fahrenheit as tested by the Elliott method—closed cup—according to directions prepared by the State Oil Chemist.

13. The Commissioner, with the approval of the Oil Committee, may suspend or change any of these regulations until the ensuing meeting of the Board.

____ ____,

Commissioner, Oil Committee."

Scope of Argument.

We shall contend that the oil inspection acts are not in harmony with the Constitution, First, because they violate the interstate commerce clause of the Constitution, and this we shall seek to show not only from the words of the acts themselves, but also from the history of this legislation, the minority report of the committee which was subsequently adopted by the Legislature, and also from the fact, which has since been demonstrated, that it is a source of great revenue and is not really an oil inspection law at all. Second, we shall contend that these acts are an attempt to delegate legislative power, which, under Article I, Section 8, of the Constitution of North Carolina may not be done, as the three powers of government "ought to be forever separate and distinct from each other." In this connection we shall analyze the said acts and shall seek to show that the Board of Agriculture are left without any proper guide in applying the test, and that North Carolina is the only State in the Union in which a standard test is not provided by the Legislature itself, and we shall seek to show further that this is a judicial question, affecting the constitutional right of the citizen to pursue its business, and that the danger from oil explosions in the light of experiences and in consequence of the progress of science is now negligible, and, lastly, we shall contend that this legislation violates the Fourteenth Amendment to the Constitution in that it deprives complainant of its property without due process of law, and abridges its privileges and immunities, and denies to it the equal protection of the laws.

We shall ask leave of the Court to permit us in the exemplification of our argument herein to refer to the reports of the State officials

of North Carolina, showing the net avails of the proceeds arising from the oil inspection tax since the law went into effect in the summer of 1909, amounting to thousands of dollars, "clear of stumps and runners."

This Legislation Violates the Commerce Clause:

"If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious or partial restraint."

Gibbons v. Ogden, 22 U. S., 9.

"By whatever name called, the attempt by a State to tax interstate commerce is void."

Corporation Tax cases, 220 U. S., 160.

Galveston Railroad v. Texas, 210 U. S., 1.

"The power to tax involves the power to destroy."

Chief Justice Marshall in McCullock v. Maryland.

An habitual and continual levying and collecting of taxes for inspection purposes far in excess of the amount necessary, and the covering of such taxes into a State Treasury, is quite conclusive that the law was passed to raise revenue, and not for inspection purposes.

Postal Appeals, 192 U. S., 55.

If the Legislature can handicap commerce between the States by imposing excessive inspection taxes, "the police power would not only be a formidable rival, but in a struggle must necessarily triumph over the commercial power."

Chief Justice Fuller, Wilkerson v. Robner, 140 U. S., 545.

Under the guise of inspection laws, a system of interstate tariff taxation has arisen and States have acted under a misconception of the opinion of this Court in the Patapsco Guano Case, 171 U. S., 345, to such an extent that State governments are largely operated upon funds derived from illegal and unjust inspection laws.

Brewing Appeals, 198 U. S., 17.

As North Carolina manufactures no oil, it is proceeding under the guise of an inspection act to tax oils from other States. The States

of the Union will be much less affected now if compelled to observe the interstate commerce clause of the Constitution than they will be a few years hence when this system of taxation has become more thoroughly engrafted into their respective revenue laws.

"That the act does not on its face discriminate against oil from sister States makes no difference. Interstate commerce can not be taxed at all."

Robins v. Tax Dist., 120 U. S., 489.
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We maintain that this legislation is an attempt and a most successful attempt to raise large revenue at the expense of interstate commerce and is not an inspection law at all. The two acts having been passed at the same session of the Legislature, are to be considered as but one statute. "It is a rule in the construction of statutes, that all statutes which relate to the same subject matter, * * * must be taken to be one system and so construed."

Lord Bacon, 3rd Rule, Vol. 6, 382.

The same principle is enunciated by Chief Justice Ruffin in *State v. Bell,* 3 Iredell 509, and by Chief Justice Nash in *State v. Melton,* Busbee's Law, 49.

That this legislation was really a tax and an attempt to raise larger revenue for the State of North Carolina, and not for the purposes of inspection, must be clear from a perusal of the caption and preamble of the act of the 9th of March. The caption is, "An Act to suspend the collection of taxes under Section 58 of the Revenue Act *because of the higher taxes imposed by the Oil Inspection Act.*" The tax on oil under said sec. 58 was less than $10,000. See opinion of Connor, Judge, herein. The preamble recites that the tax imposed for the inspection of illuminating oils being greater than the tax imposed under section 58 of the Revenue Act, and "whereas it is not the purpose of the General Assembly that the said taxes shall be cumulative, Now, therefore, the General Assembly do enact, etc." Thus it is seen that the Legislature regarded this so-called inspection of oils as really a part of the State scheme of taxation and candidly declared "that the taxes shall not be cumulative." Now if the inspection of oil was a necessary and proper exercise of the police power of the State, could it be said that the charge of one-half cent per gallon for that purpose was a tax at all? The taxing power of a State and its police power are as far apart as the poles. It is plain, we submit, that the Legislature concluded that more revenue could be covered into the State Treasury from a one-half cent per gallon tax for inspection purposes than Section 58 of the Revenue Act would provide. Ad-

dressing himself to the office of a preamble, the late Mr. Justice Harlan (*Coosaw Mine Co. v. South Carolina,* 144 U. S., 550) declares, "that the preamble has been said to be the key to open the understanding of a statute." Again he says, "where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice and will have its due share of consideration," citing *U. S., v. Palmer,* 3 Wheat, 610.

As further evidence of the fact that these acts are a part of a State scheme of taxation, Section 5 is most persuasive. It is therein provided that on the 1st day of June and December each year, the State Treasurer shall "turn into the general fund of the State all moneys of the oil fund in his hands in excess of the amount drawn out by the Commissioner of Agriculture for expenses." We beg to file as a part of this brief, the report of the Oil Inspection Division of the State of North Carolina for the current year, showing that the expected happened and that there was covered into the State Treasury from the so-called oil inspection laws, for the year past, the net sum of $26,000.00, and $1,483.79, for the use of said Division still remained. As was said in this Court in *People of New York v. Compagnie Gen. Trans. Co.,* 107 U. S., 759, "A State can not make a law designed to raise money to support paupers, etc., an inspection law within the constitutional meaning of that word by calling it so in the title." A "thing of this sort" shocks the conscience, *Postal Tel. Appeal,* 192 U. S., 55.

This case is, we think, easily distinguishable from *Patapsco Guano Co. v. The Board of Agriculture,* 171 U. S., 345. Indeed, it seems to us that a fair construction of the opinion of the Court in the Patapsco Guano case, is direct authority sustaining the unconstitutionality of the act of March 9, 1909. It may be remarked that the Patapsco decision did not have the sanction of the entire Court, and it is apparent that but for the fact that the Legislature of North Carolina, in 1891, repealed all unconstitutional laws and provisions relating to a disposition of the fertilizer inspection tax, above the cost of inspection, the opinion of the Court would have been adverse to the validity of the fertilizer inspection taxes. In the Patapsco fertilizer case it appeared that a large surplus remained each year over and above the amount necessary for inspection purposes, and that subsequent Legislatures appropriated from the inspection tax considerable sums of money to support an industrial school and other industrial associations, and a geological survey. But as soon as the attention of the Legislature was called to the fact that these provisions stamped the entire fertilizer inspection taxation as a part of the revenue law of the State, very promptly, by Chapter 338, of the Laws of 1891, were all of these unconstitutional provisions repealed. The case at bar is far different. The caption and preamble of the second act, as we have seen, speaks of the oil inspection act *as a tax.*

The acts breathe the spirit of taxation and not inspection and declare that it would be double taxation—cumulative—to impose an inspection tax, and also a tax under section 58 of the Revenue Act. The word cumulative means, of like kind—e. g.—cumulative evidence. It must be that the Legislature regarded the oil inspection act as probably inimical to the Constitution of the United States, for fearing that the act would be so declared, it suspended Section 58 of the Revenue Act only on condition that the oil inspection acts were sustained. The acts in question also, as we have seen, are a standing menace to interstate commerce, because they provide *totidem verbis* that all excess above the cost of oil inspection shall be semi-annually covered into the Treasury of the State of North Carolina. Thus a system of taxation upon interstate commerce is growing up in each State in plain violation of the fundamental law of the land. And by the acquiescence of the nation, the States are taxing commerce. If the State of North Carolina can cover $26,000.00 each year into its Treasury under the guise of inspecting oil, why may it not cover a like amount over and above the cost of inspecting adulterated flour, adulterated meal, beef shipped from the west, and other products *ad infinitum?* If the tax is once paid, the injured party can not recover it, 192 U. S., 60. At what stage of the game of taxing interstate commerce can persons or corporations who are injured thereby appeal to this great tribunal for relief, if the case at bar is not one? We are now considering an act, which by its very words, contemplates a surplus over and above the cost of inspection, an act which provides that such surplus shall be perpetually covered into the State Treasury, an act which interprets itself by providing that the taxes under the general revenue law stand on the same footing with the taxes under the oil inspection law; repealing the former because if the two acts stand together *taxes* derived under the Revenue Act and taxes from the oil inspection act will be *cumulative*. We likewise have a case in which it appears that the expected result happened, and a surplus amounting to $26,000.00 was covered into the Treasury of North Carolina last year from the so-called oil inspection laws. We submit, therefore, that the oil inspection laws of North Carolina fall directly within the condemnation of this Court in construing the fertilizer inspection laws in the Patapsco case, *supra*. Nor has the Legislature of 1911 done aught to cut down this immense annual sum, so unlawfully extorted from oil companies.

Disproportionate Inspection Tax Strong Evidence of Unconstitutionality of Act.

By analogy to the law governing imposts and excise duties, in its technical sense, we think that a safe rule for the guidance of legislative bodies can be fixed. Article I, Section 10 of the Constitution, speaking to this subject, limits a State to what shall be "absolutely

necessary" for that purpose, and still further to guard against the abuse of this power, it is declared that "the net produce of all duties and imposts laid by a State on imports and exports shall be for the use of the Treasury of the United States."

As often as this question has come to this Court, it has been determined that grossly unreasonable inspection fees render the act void and unmask the same, disclosing the real intention to tax, to raise revenue, and not to inspect. As was said by Mr. Justice McLean, Passenger cases, 7 Howard, 819, "The cautious manner in which the exercise of this commercial power by a State is guarded, shows an extreme jealousy of it by the convention."

It will be noted that the act in question does not cover into the United States Treasury the large excess above the cost of inspection, amounting annually to more than $27,000, but covers the same into the State Treasury.

Brimmer v. Redman, 138 U. S., 79.

A tax of one cent per pound for inspection of cattle slaughtered more than 100 miles from Virginia was declared a revenue act and in no sense an inspection act.

A tax of $500 on fertilizer drummers was declared in *A. F. Co. v. Board of Agriculture,* 43 Fed., 610, to be an act to raise revenue and void.

The police power of a State can not obstruct interstate commerce beyond the necessity of its existence, and therefore an act of the Missouri Legislature shutting out from that State between March 1st and November 1st all cattle from Texas and Mexico, was declared not a police regulation but an interference with interstate commerce,

Hannibal R. R. v. Husen, 95 U. S., 465.

An inspection tax of $1.00 on each telegraph pole of the Postal-Cable Telegraph Company was declared by this Court to be a revenue act pure and simple and not an inspection act.

192 U. S., 64.

Under the guise of protecting the health of employees, this Court held that an act of the New York Legislature was unconstitutional and void, being really an attempt to regulate the private affairs of master and servant.

Lochner v. N. Y., 198 U. S., 45.
Stockard v. Morgan, 185 U. S., 27.

These cases and many others which might be cited, show that this Court will look at the substance of such acts, and "while it acts on the presumption that the statute was enacted in good faith for the purposes which the power can be exercised, yet its operation and validity must be determined by its natural and reasonable effect, and this

presumption can not control the final determination of the question whether it is repugnant to the Constitution of the United States."

Regulation of Commerce, Calvert, p. 97.
Vance v. Vandercook Co., 170 U. S., 439.
Brown v. Maryland, 12 Wheat, 419.
Minnesota v. Barber, 136 U. S., 313.

The Missouri Beer Cases, 198 U. S., 17, merely construe the Wilson Act.

History of this Legislation.

We are not inadvertent to the opinion of Chief Justice White in the Standard Oil decision at the last term, that "although debates may not be used as a means for interpreting a statute, that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted." The value of debates in a case of this kind is well illustrated in an opinion of the Wisconsin Court, *State v. R. R.*, 19 L. R. A. (N. S.), 330. This opinion holds that an act of the Wisconsin Legislature regulating hours of labor on interstate trains is in conflict with the Hours of Labor law of Congress, although the Wisconsin statute was passed before the United States statute took effect, but during the year provided by Congress for railroads to make preparation for the new law. The mind of the Wisconsin Legislature was interpreted by its Court of last resort through the debates of the members of the Legislature and the reports of the committees on the said statute.

Cor. Tax Cases, 220 U. S., 160.

The evidence in the case shows that the oil inspection act was introduced in the Legislature on the 11th of February, 1909, by Senator Doughton, passed its first reading and was referred to the Committee on Finance. A majority of the committee filed a report against the bill, but a minority filed a report in which they said: "Many of the States not only protect the people in the matter of light, but receive considerable revenue from the inspection. Ohio for six months, from June 1st to December 1st, 1908, received $53,815; Tennessee in 1908 received $54,550; Georgia for 1907 received $14,976.23." The bill contains the further indorsement, "March 5th, 1909, reported favorably as amended, with minority report."

The evidence further discloses the fact that during the progress of the debate on the bill, Mr. Bowie of Ashe, who was in charge of the bill in the House of Representatives, said that oil inspection acts were in force in 30 States and that letters from the Treasurers of many of the States show that the inspection is a source of great revenue to the State. Mr. Doughton of Alleghany, in speaking in

behalf of the bill, declared that it would bring at least $30,000 per year net revenue into the State Treasury. Mr. Stubbs of Martin, opposing the bill on constitutional grounds, declared that it was likely to be held unconstitutional because it was an effort to and would secure a revenue for the State.

The evidence shows that the main discussion with the committee and in the two bodies of the Legislature, was upon the bill as a revenue producing measure. The voice of the Legislature was one on this subject. Taking the three acts together, in connection with this evidence, it is manifest what the object of the oil inspection act is. In the first place, it provides for a tax of one-half cent per gallon, which, according to the evidence, will produce an income of more than $40,000.00, based on the quantity of oil used in the State before the passage of the act, and by actual experience has produced over $60,000.00 annually. In the next place, the act itself shows on its face the belief on the part of the Legislature that there would be a surplus, and provides what shall be done with the surplus. In the third place, Chapter 441 declares in its title that Section 58 of the Revenue Act is suspended because of the higher taxes imposed by the oil inspection act, and in the clause stating the reason for the adoption of Chapter 441, it expressly states, "And, whereas, the said tax is much greater than the tax imposed under Section 58 of the Revenue Act, and, whereas, it is not the purpose of the General Assembly that said taxes shall be cumulative, now, therefore, the General Assembly of North Carolina do enact, etc." It must be conceded that if the inspection is made for the purpose of raising revenue and not for the sake of improving the quality of oil and protecting the people against danger and fraud, the act is unconstitutional as being an interference with Interstate Commerce.

The intent of the Legislature was to strike out Section 58 of the Revenue Act and insert in its place the Oil Inspection Act.

Postal Co. v. Taylor, 192 U. S., 60.

Under guise of police power a city can not levy tax on telegraph poles far in excess of cost of inspection.

As was said by this Court in *Lochner v. New York,* 198 U. S., 45, "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power, for the purpose of protecting the public health or welfare, are in reality passed from other motives. * * * The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the Constitution of the United States, must be determined from the natural effect of such statutes when put into operation, and not from proclaimed purpose." This Court then proceeds to declare that the law in question was not really a health law, but was simply enacted to regulate the hours of labor in a private business, not dan-

gerous to morals. So in the case at bar. We maintain that when we look under the surface, we see a statute regulating taxation, affecting revenue, adding $26,000 per year to the Treasury of North Carolina, and passing to the oil division nearly $2,000 more for the coming year. Nor is the end yet reached, for a system of taxation on commerce is rapidly developing, furnishing to the States untold revenue, and creating fixed charges which some day will be hard to meet when these so-called inspection acts—but really revenue acts—are thrust through with the sword of justice and fall prone to the ground. The sooner the surgeon's knife is applied, the more speedily will the patient recover.

We direct the careful attention of the Court to the fact that every estimate contained in the complainant's bill of complaint as to the cost of inspecting the oil, and as to the net revenue derived from inspecting the same, has been fully justified by subsequent events. The opinion of the learned District Judge, H. G. Connor, would seem to justify the conclusion that if the allegations in the bill as to this act producing a large amount of revenue could have been seen to be true in advance, the act would have been held invalid.

Legislative Power Can Not be Delegated.

The Constitution of North Carolina, Article I, Section 8, provides that "the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other." This Court, as well as other judicial tribunals, and text writers, has uniformly adhered to the rule that legislative power can not be delegated.

Field v. Clark, 143 U. S., 649;
United States v. Keokuk Railroad, 45 Fed. Rep., 178;
Freund Police Power, Par. 649.

We shall presently see that the Legislature of North Carolina stands alone among the States of the Union in not having specified standard of safety for oil, but has delegated this whole question to an auxiliary board, to wit: The Board of Agriculture. In passing upon the validity of an act of Congress committing to the Secretary of the Treasury the determination of what teas may be imported, in *Butterfield v. Stranahan,* 192 U. S., 470, it was said that the Congress had fixed "a primary standard and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute." "A statute which delegates a discretionary power to fix the rule by which taxes shall be adopted, or rights measured, is unconstitutional." Commerce Clause in Federal Constitution, Prentice and Egen, 311.

The Legislature itself ought to lay down the test, which ought to be defined by general rules:

Freund Police Power, Par. 649.

The particular exercise of police power must tend in a degree that is perceptible to secure some object of the proper exercise of police power and the Court must be able to see that the means adopted have a reasonable relation to the ends desired.

145 N. Y., p. 39;
See also Gibbons v. Ogden, 9 Wheat., 1;

If act is intended to raise revenue, it is not valid:

Willis v. Standard Oil Co., 50 Minn., 290;

State can not make an inspection law within the constitutional meaning of that word by calling it so:

People v. Campagnie Zenerale Trans. Co., 107 U. S., 759.

Where visible poor quality effects neither health nor safety, the police power can not interfere.

Freund Police Power, Sec. 279;
See also 171 U. S., 18 and 30.

The Legislature of Ohio refused to permit a steam engineer to do business unless he obtained a liscense from the district examiner. The Supreme Court of that State held the law unconstitutional because it was altogether too general and made an autocrat of unlimited discretion out of the Board of Examiners, without prescribing qualifications for the applicant:

Harmon v. State, 66 Ohio, 249;
Matthews v. Murphey, 23 Ky., 750:

This case decides an act of the Kentucky Legislature unconstitutional which authorized the Board of Health to refuse a certificate to an individual "guilty of grossly unprofessional conduct likely to deceive the public." The Kentucky Court said that this act was altogether too general as it prescribed no rule to guide the Board and was for that reason unconstitutional, citing a wealth of authority to sustain the position. So again the California Court (*Schaezlin v. Cabaniss,* 135 Cal., 466) held an act unconstitutional which authorized the Commissioner of Labor to provide "a contrivance to prevent inhalation of dust or injurious gases." "The very idea," says the Court, "that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Yick Wo v. Hopkins, 118 U. S., 356:

This case involved the constitutionality of an ordinance which forbade the carrying on of a laundry in San Francisco "without first obtaining the written permission of the Board of Supervisors."

The Court characterized the act as a "naked and arbitrary power and acknowledges neither guidance nor restraint," and quotes the famous language of the Massachusetts Bill of Rights: "The Government of the Commonwealth must be a Government of laws and not Men."

In *Mayor of Baltimore v. Radecke*, 49 Md., 217, an ordinance was declared unconstitutional which provided that no person should erect any steam engine, etc., within the limits of the city without first obtaining the sanction of the City Council. The Court of Appeals declared that this ordinance was fatally defective in that it failed to prescribe regulations and to provide precautions and safeguards.

In re Kollock, 165 U. S., 526.

It is true that there are some subjects of legislation where a standard can not be fixed by the law-making powers, and the details must be worked out by some board appointed by it, but as said by Chief Justice White, 192 U. S., 470: "The law-making power must at least fix a *primary standard*, leaving it to the agency appointed to effectuate the legislative policy." In this case no primary standard is fixed, nor are rules provided for fixing the same, though it appears from reading the act that the Legislature, when the bill was first offered, contemplated so doing.

The test determining the validity of discretionary power appears to be that if the controlling rule is fixed by the Legislature, and the power delegated is a power to apply this general rule to specific facts, or to determine some fact upon which the Legislature makes this action dependent, then the law is valid." Idem., p. 311.

In our case, the General Assembly delegates to the Board of Agriculture the power to fix the rule by which the tax on oil dealers shall be guided; indeed, it expressly, in terms, authorizes the Board of Agriculture to adopt standard as to safety, purity, the absence from objectionable substances, and luminosity and * * * which they may deem necessary to provide the people of the State with satisfactory illuminating oil. The Legislature fixes no rule by which safety, purity, or luminosity is to be ascertained, but all of these things are left entirely to the uncontrolled discretion of the Board of Agriculture. They can fix the test at 100 degrees Fahrenheit, as tested by the Elliott method, closed cup, or they can fix it at 200. They can make one the standard today, and the other the standard for tomorrow. They can destroy the business of all oil dealers, without their "day in Court."

Section 1 of Chapter 554, Laws of 1909, provides that all kerosene, or other illuminating oils, sold, or offered for sale in this State for illuminating purposes, shall be subject to inspection and tested to determine the safety and value for illuminating purposes. It further provides that the Department of Agriculture shall have power at all

times and at all places to have collected samples of illuminating oil offered for sale and have the same analyzed, and declares that the inspection of oils, as authorized in this act, shall be under the direction of the Board of Agriculture, which is authorized to make all necessary rules and regulations for the inspection of such oils and to adopt standards as to safety, purity, or absence from objectionable substances and luminosity, when not in conflict with the provisions of this act, and which they may deem necessary to provide the people of the State with satisfactory illuminating oil.

Section 7 provides that whenever a complaint is made in regard to the illuminating qualities of any oil sold in this State, the Commissioner shall cause a sample of said oil, or oils, procured and have the same thoroughly analyzed and tested as to safety and illuminating qualities. If such analysis, or other tests, shall show that oil is unsafe, or of inferior illuminating quality, its sale shall be forbidden, and report of the result, or results, be sent to the party making the complaint and to the manufacturer of said oil. Nowhere in said act is any standard fixed for the determination for the safety and luminosity of the oil, nor are the oils required to come up to any particular standard. The only reference to any standard is in section one and section seven. In section one, the Board is authorized to make all necessary rules and regulations for the inspection of such oils and to adopt standards as to safety, purity or absence of all objectionable substances, and luminosity, and strangely enough, said section continues with the following words, "when not in conflict with the provisions of this act, and which they may deem necessary to provide the people of the State with satisfactory illuminating oil." It is clear that the draftsman had, at one time, put in the bill some provision fixing a standard, which seems to have been dropped or omitted from the statute, without taking out of the statute the words "when not in conflict with the provisions of this act." The only other reference to the standard is found in section seven: "If such analysis or other test should show that oil is unsafe, or of inferior illuminating quality, its sale shall be forbidden." Forbidden by whom? Clearly, by the Board of Agriculture. So the Legislature has not even undertaken to forbid the sale of oils when unsafe or of inferior illuminating quality, but leaves this to the Board of Agriculture. This act differs materially from the act in reference to commercial fertilizers, and the difference is the difference between an unconstitutional and a constitutional act; between the delegation of legislative power and the exercise of legislative powers by the legislative body. The act in reference to commercial fertilizers may be found in Chapter 87, Secs. 3945-3948, Vol. II of Revisal of 1905. That act provides that it shall be unlawful to sell or offer for sale fertilizers and fertilizer material not coming up to the following minimum requirements: (prescribing the various forms of fertilizer). In the oil inspection act, the Legislature turns the whole

matter over to the Board of Agriculture. In the commercial fertilizer act, the Legislature lays down every rule of conduct and fixes the standard, leaving the Board of Agriculture, to quote the language of the act, "the enforcement and supervision of the laws which are, or may be enacted, in this State for the sale of commercial fertilizers, and with authority to make regulations concerning the same." The same careful legislation appears in the same chapter in Sec. 3958, under the head of cotton seed meal. The standard is fixed by the Legislature, the rules are laid down and it is then provided that the State Board of Agriculture is empowered and directed to make such rules and regulations as are necessary to a proper carrying into effect the provisions of this sub-chapter. In the same chapter, Sec. 3963, under the head of commercial feeding stuffs, the Legislature itself passes the law and requires the manufacturer to state the maximum percentage it contains of crude fibre, and the minimum percentage of crude fat, and of crude protein, allowing one per cent of nitrogen to equal 6 1-4 per cent of protein. It then makes it a misdemeanor to sell any of said commercial feeding stuffs that do not come up to the standard guarantee as above required, or to sell it mixed or adulterated with any foreign mineral, or other substance or substances than those stated on the bag. The same chapter under the head of pure food, Sec. 3969, provides that no person shall knowingly manufacture, sell, expose for sale, or have in his possession, with intent to sell, any article of food which is adulterated or misbranded. It then defines "adulteration" and "mis-branding." It fixes the standard of food. It declares what shall be dangerous, or deleterious to health when added to human food. The Board of Agriculture is authorized to make rules and regulations for the enforcement of this law.

The Courts have gone to the limit in permitting the delegation of legislative power to railroad commissions. They have done this because of the necessity of the situation, it being apparent that the fixing of rates for railroads is so complicated and requires such a mass of evidence, that it is almost impracticable for the Legislature to deal with the subject, but even in matters of this sort, the Legislature has always undertaken to fix the standard. While not fixing definite rates, they have fixed the standard by which the rate shall be determined. For instance, take section 1099 of The Revisal of 1905, which provides, "the commission shall make reasonable and just rates * * * for the transportation of freight and passengers." Then section 1104 prescribes what the commission shall consider in order to arrive at the "reasonable and just rate." The standard is fixed by the Legislature as "a reasonable and just rate" and the rules for ascertaining the same are laid down in the legislative act. Nothing is left to the discretion of the Corporation Commission except the making of such rules and regulations as may be necessary to the enforcement of the legislative act. Then in the

matter of the learned professions, where examinations have always been provided for, the discretion is not vested in the examining board. The Legislature itself prescribes the rule and fixes the standard. Take section 4498 of The Revisal. This section provides that it shall be the duty of the Board of Medical Examiners to examine all applicants who shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college in good standing requiring an attendance of not less than three years, and supplying such facilities for clinical instruction as shall meet the approval of said Board, on the following subjects: anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics and the practice of medicine. The Legislature itself prescribes the conditions upon which one may obtain license to practice law. He must be twenty-one years of age. He must file a certificate of good moral character. He must stand an examination in writing based upon a course of study prescribed by the Supreme Court of the State. Attorneys at law being officers of the court, subject to the rules of the court, the amount of learning which he possesses is left to the Court, but this is an exception and may be treated as having grown up out of the favor of the courts toward lawyers, from whom all courts are supposed to be recruited.

Pharmacists are required, under provisions of Sec. 4480 of The Revisal, to be eighteen years of age, and have three years experience in pharmacy under the instruction of a licensed pharmacist, and he shall also pass a satisfactory examination before the Board of Pharmacy. In cases where persons have attended a reputable school or college of pharmacy, the actual time of attendance at such school or college of pharmacy may be deducted from the time of experience required, but in no case shall less than two years' experience be required for registration.

Teachers of public schools are not turned over to the Superintendents of Education. On the contrary, they are to be examined by the County Superintendent on all the subjects required to be taught in the public schools, and also on the theory and practice of teaching, and if they obtain a general average of 90 per cent or more, they shall be entitled to a first grade certificate. The Superintendent is required to file in his office copy of all examination papers and grades of all applicants for license. Section 4162 of The Revisal.

Everywhere in the legislation of this State will be found a recognition of the doctrine that the Legislature can not delegate legislative power. Everywhere the Legislature itself fixes the rule or standard by which the rights of individuals are to be tested, and only leaves to the bodies charged with the execution of the law the ascertainment of the fact that the individual, or the substance, comes up to the legislative standard, and this is the test of the constitutionality of such legislation.

Patterson v. Ky., 97 U. S. R., 501; the standard was here fixed by the Legislature at which oil should flash.

And in *U. S. v. Grimand*, 220 U. S., 506, Congress could not in the nature of things designate a fixed standard as to what lands might be grazed and hence delegated this duty to the Commissioner.

Regulations of the Department of Agriculture.

These regulations are thirteen in number, and the thirteenth one provides that the Commissioner and the oil committee may suspend or change any regulations until ensuing meeting of Board, *thus delegating to a small portion of the Board of Agriculture the important and grave duties which should have been assumed by the Legislature of the State.* The said rules likewise provide that the flash test of illuminating oils shall not be less than 100 degrees Fahrenheit tested by the Elliott method. As we shall see, and as the opinion of the learned Circuit Judge states, North Carolina is the only State in the Union in which the question of the flash test is not definitely fixed by the Legislature itself. It was easy to do. Nothing had to be left of necessity to the discretion of the oil committee of the Board of Agriculture. If the Legislature could delegate this matter to the Board of Agriculture, and if the Board of Agriculture could refer the same to a sub-committee of its body, important functions of goverment affecting interstate commerce and taxation would pass from the sovereign power of the State into the hands of a few people. *Com. v. Malatsky* (Mass.), 24 L. R. A. (N. S.), 1172.

It will be observed that section 8 of the oil act provides "that any violation of the regulations adopted by the Board of Agriculture shall be guilty of a misdemeanor." The California Court (*ex parte* Cox, 63 Cal., 21), holds a provision of this kind fatal to this character of legislation, bringing out the distinction between the power to determine administrative details, and the power to say what act shall be unlawful. The act does not say it shall be unlawful to sell oil below a certain flash test, but attempts to confer upon the Board the power to declare what shall and what shall not be a misdemeanor.

All States Fix Standard.

More than thirty States in the American Union have adopted oil inspection laws. It is instructive to note that each one of these laws, without exception (except the Statute of North Carolina which we are attacking) fixes the standard. In each instance, the statute declares that oil shall not be introduced into the State unless it comes up to the standard named in the act, and generally the method of ascertaining the standard is laid down. Five States lay down a flash test of 100 degrees, four lay down a test of 105 degrees, three of 110 degrees, one of 112 degrees, one of 115 degrees, four of 120

degrees, five have a fire test of 110 degrees, one of 115 degrees fire test, five of 120 degrees fire test, one of 125 degrees fire test, one of 130 degrees fire test, one of 140 degrees fire test, and three of 150 degrees fire test. It will be observed that some of the States have both flash and fire test. Connecticut, for instance, requires a flash test of 110 degrees, or a fire test of 140 degrees. New Hampshire requires a flash test of 100 degrees, or a fire test of 120 degrees, as does also Wisconsin. The Tagliabue tester is prescribed by 33 States, the Elliott by five States, the Foster by four States, and the Elliott or Foster close tester by two States.

If the Legislatures of these States could have delegated to some commission or individual the fixing of these standards, and tests, why is it that they have so uniformly, and without a break, until the action complained of on the part of the Legislature of North Carolina, pursued the policy of fixing the standard themselves. The details of said acts are given in this brief in order to show that there was on hand and available a sufficient amount of information for the Legislature to have acted intelligently, and the rule of necessity can not, therefore, be invoked in aid of the delegation of this legislative power. If what the standard should be was known to 34 States and the instrument with which the test should be made, and the rules for making the test were obtainable, then surely the North Carolina Legislature ought itself to have followed the lead of the other States in prescribing its own standards and fixing the instrument with which the compliance with said standard was to be tested. Instead of doing so, she has left this whole subject to the Board of Agriculture. That legislative power can not be delegated, is fundamental.

"It is a general rule in constitutional law that a sovereign power conferred by the people upon any branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political constitution, and when properly understood, permits of no exception." Cooley on Taxation, Vol. I, 3d Ed., page 99, quoted in 15 L. R. A. (New Series), page 71.

In the case of *Dowling v. Lancanshire Insurance Company*, the Supreme Court of Wisconsin, in a strong opinion, holds that an act of the Wisconsin Legislature conferring upon the Insurance Commissioner of Wisconsin the adoption of a standard fire insurance policy, and providing for the use of said policy, under penalties, is unconstitutional, in that it is a delegation of legislative power. In the course of the opinion, the Court says: "That no part of legislative power can be delegated by the Legislature to any other department of the government—executive or judicial—is a fundamental principle in constitutional law, essential to the integrity and maintenance of the system of government established by the Constitution." The Court quotes with approval the following language, used by Ranney,

J., in *C. W. & Z. R. Co. v. Clinton County Commissioners,* 1 Ohio St., 88: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made." The Court, after reviewing many authorities, says: "The act, in our judgment, wholly fails to provide definitely and clearly what the standard policy should contain, so that it could be put in use as a uniform policy, required to take the place of all others, without the determination of the Insurance Commissioner in respect to matters involving the exercise of a legislative discretion that could not be delegated, and without which the act in conformity to which all fire insurance policies were required to be issued. * * * The effect, clearly, was to transfer to him bodily the legislative power of the State on that subject. Within the limits prescribed, he was to prepare just such a policy or contract as, in his judgment and discretion, would meet the legal exigencies of the case, and no one could certainly predict what the result of his action might be. It was not to be published, as laws are required to be, or to be approved by the Governor. * * * The result of all cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the Legislature, so that, in form and substance, it is a law, in all its details, *in presenti,* but which may be left to take effect *in futuro,* if necessary, upon the ascertainment of any prescribed fact or event. Instead of preparing a form of standard policy, and adjusting it to the existing legislation, or modifying such legislation, if necessary, by virtue of its constitutional functions, the Legislature delivered over this task wholly to the Insurance Commissioner, to accomplish it as nearly as might be; and this depended wholly upon his discretion and judgment as to what the law should be in this respect, for the act had not specifically declared it." 31 L. R. A., 112.

The same Court in *ex rel. E. J. Adams v. R. J. Burgh et al.,* 37 L. R. A., 157, holds that the legislative power can not be delegated to the State Board of Health so as to enable it without the enactment of any statute upon the subject to pass any rule excluding children, who are authorized by statute to attend the public schools from such attendance, unless they have been vaccinated.

The same effect is *O'Neill v. American Fire Insurance Company,* 26 L. R. A., 715. This is a decision by the Supreme Court of the State of Pennsylvania. The Court says: "The words 'legislative power' mean the power or authority, under the Constitution or frame of government, to make, alter, and repeal laws * * * The elementary books divided a statute into three parts,—the declaratory, the directory, and the vindicatory. In this statute the Legislature

furnished the first and third. It delegated the preparation of the second. It declared, in effect, the need of a standard form of policy. It provides punishment for the failure to use such form, when provided; but it turned the preparation of the form over to its appointee, and gave him six months in which to do his work, and file a copy of it in his own office. Whoever might be interested in knowing the directory part of the statute, and understanding what it was he was required to do, had to go beyond the act of Assembly, and inquire of the appointee of the Legislature what it was he had filed in his own office, of which the people of the commonwealth were bound to take notice at their peril. We do not know how a case could be stated that would show a more complete and unconstitutional surrender of the legislative function to an appointee than that presented by the Act of 1891. By its provisions the Legislature says, in effect, to its appointee: 'Prepare just such a policy or contract as you please. We do not care to know what it is. File it in your own office and we will compel its adoption, whether it is right or wrong, by the punishment of every company, officer, or agent who hesitates to use it.' "

To the same effect is *Anderson v. Manchester Fire Insurance Co.*, 28 L. R. A., 609. That case was determined by the Supreme Court of Minnesota, and was twice argued. The case is for this reason a strong authority. In the course of the opinion by Canty, Judge, the following language occurs: "There was no reason why the Legislature could not pass this act as well as the commissioner. There may be a necessity for police regulation in the insurance business, for the protection of the insured and the insurer; and the regulation of many matters of detail, exceptional matters, and matters which can not be well regulated by the general provisions of law, may perhaps be delegated to such a commissioner. But this is not such a matter. There is no necessity for changing from time to time, between legislative sessions, the provisions which should be put in such a standard form so as to meet changing conditions. * * * As said in *State v. Young*, 29 Minn., 551: 'It is a principle not questioned, that, except where authorized by the Constitution, as in respect to municipalities, the Legislature can not delegate legislative power; cannot confer on any body or person the power to determine what shall be law. The Legislature only shall determine this.' " See also the following:

Ex parte Cox, 63 Cal., 21;
Port Eureka Harbor Comrs. v. Excelsior Redwood Co., 88 Cal. 491;
State, Marshall v. Cadwalader, 36 N. J. L., 283;
State v. Armstrong, 3 Sneed, 635;
Barto v. Himrod, 8 N. Y., 483, 59 Am. Dec. 506;
Kosciusko v. Slomberg, 68 Miss., 469, 12 L. R. A., 528;

Hannibal & St. J. R. Co. v. Husen, 95 U. S., 465, 24 L. ed. 527;
People, Copcutt v. Yonkers Board of Health, 140 N. Y., 1, 23 L. R. A., 481;
Re Smith, 146 N. Y., 68, 28 L. R. A., 820;
State v. Speyer, 67 Vt., 502, 29 L. R. A., 573;
State v. Fon du Lac Board of Education, 63 Wis., 234, 53 Am. Rep., 282.

Question for the Court.

"The police power—the power to make laws to secure the comfort, convenience, peace, and health of the community—is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for that purpose is necessarily committed to the legislative body in which the power to make such laws is vested. But it is not true that, when such power is exerted for the purpose of regulating a useful business or occupation, the Legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or profession which in itself is recognized as innocent and useful to the community. As the right of the citizen to engage in such a business, or follow such a profession, is protected by the Constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power."

Tiedeman, Pol. Powers, Paragraphs 95, 194;
State v. Jersey City, 47 N. J. L, 286;
Com. v. Robertson, 5 Cush., 438;
Austin v. Murray, 16 Pick., 121.

"This principle is stated very forcibly in the case of *Mugler v. Kansas,* 123 U. S., 661, 31 L. ed. 210, as follows: 'The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge and thereby give effect to the Constitution.'" "Police power must be exercised in subordination to the Constitution." *"In Re Jacobs,* 98 N. Y., 108." From *ex parte Whitwell,* 19 L. R. A., 727.

"The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, can not control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part

of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the Courts must sustain the supreme law of the land by declaring the statute unconstitutional and void * * * It is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

Minnesota v. Barber, 136 U. S., 313.

Violates Fourteenth Amendment of Constitution.

If the Court shall determine that oil is now so dangerous that it is a proper subject of inspection, the complainant contends that it should not be required to pay a larger sum than is necessary for this purpose. As has been shown, the revenue raised from oil inspection is double the cost of the actual inspection of the oil. The Legislature of 1909 passed these acts. Since then the Legislature of 1911 has met and failed to reduce the inspection fees. The law had been in force, when the Legislature of 1911 adjourned, for nearly two years. As a revenue producing act it had proved a great success. Let us assume that instead of a tax of 50 cents on the hundred gallons for inspection, the tax had been made $1.00 on a hundred gallons. The State of North Carolina in these circumstances would have realized a net sum of nearly $100,000 a year. The complainant contends that there must be some limit to this so-called inspection-tax-provision and that all sums levied over and above the amount absolutely necessary to inspect, is confiscation of its property, pure and simple, that it deprives it of its property without due process of law, and does not afford it the equal protection of the laws, as guaranteed in the Fourteenth Amendment to the Constitution. We have hereinbefore cited a great many cases bearing upon this branch of the discussion, which we will not now repeat. We refer to the sub-head of this brief, that excessive inspection fees furnish the best evidence of intent to tax and not to inspect; and complainant contends that a careful reading of Judge Connor's opinion shows that he would have declared these acts unconstitutional if the facts now appearing had then been known to the Court, to wit: that large sums of money are annually collected, greatly in excess of the cost of inspection, and that the same was intentionally done. This legislation can be upheld only by extending the Missouri Beer Appeals, 198 U. S., 17, so as to include oil. Under the Wilson Act whiskey and beer are contraband in States which avail themselves of the act. But oil is not contraband. It is the poor man's necessity and should be as free as the casing air.

Danger From Oil Explosions, Now, Negligible.

Is there a necessity for the inspection of oil on account of danger by reason of explosion? The history of oil production in the United States is an interesting one and full of instruction. When petroleum first obtained commercial importance, illuminating oil was the only product of much consequence, although the valuable qualities of naphtha and lubricating oils were known in part, but it has only been within the last few years that there has been effective development of the by-products. In 1880 illuminating oil constituted 84.3 per cent of the value of the crude oil, while naphtha and gasoline constituted only 6.8 per cent. In 1904 the percentage in value of illuminating oil had fallen to 52.2 per cent, while that of naphtha and gasoline had risen to 12.2 per cent. From 1880 to 1904 the quantity of illuminating oil increased 146.6 per cent, and its value 148 per cent, while during the same period, the quantity of naphtha and gasoline increased 286.8 per cent, and the value 619.7 per cent. The census figures in reference to petroleum show that the value of by-products of crude petroleum has increased from 15.7 per cent in 1880 to 47.8 per cent in 1904. As to naphtha and gasoline, the census shows that the increased production of them has been largely due, not to better methods of separation, but to the increased relative value of naphtha and gasoline to illuminating oil. The census figures show an increase in the average value per barrel of naphtha and gasoline from $1.97 in 1880, to $3.67 in 1904. The group of products broadly described as naphtha, of which the most of the grades are ordinarily designated in the United States by the term "gasoline," constitute probably the most important by-products of petroleum refining. Gasoline has obtained a very great increase in importance in recent years because of the development in the use of gasoline engines for motor cars and motor boats and other purposes. The naphthas constitute the lightest fraction obtained in the distillation of crude oil, and are the first products to come from the still. All naphthas are highly volatile, though the range in their volatility is great. Their specific gravity ranges from about 58 degrees to 90 degrees Baume. The lighter naphthas are usually called gasoline, and the heavier, benzine. The gasoline ranges from 68 degrees to 90 degrees, and the benzine from 68 degrees down.

Of course, it is manifest that the explosive and dangerous elements of crude oil are the naphthas, and when these are taken out of the crude oil, the danger ceases. Since naphtha in its various forms is more valuable than illuminating oil, the effort would naturally be to extract from the crude oil all possible naphtha, and this is exactly what has happened. In the early days of the use of illuminating oils in the United States, the statutes all forbade the mixture of naphtha with illuminating oil, because naphtha being cheap, was likely to be mixed with the oil, and to produce explosions, but with

the rise in the price of naphtha, and with the supply less than the actual demand, all naphtha is taken from the oil, and for many years there has been literally no danger in the illuminating oil placed on the market. Whatever may be said, therefore, as to the necessity for inspection of illuminating oils in the early days of their use in this country, the necessity has long since passed away.

Evidence discloses that there is no necessity for investigation as to luminosity, and if a necessity existed, that the investigation can not be carried out for the want of any data upon which to base a regulation. Different crudes produce, when of the same fire test, different candle power. The luminosity has no fixed relation to fire test, but as a rule, the higher the fire test, the less luminosity, so that the rule for luminosity would have to be inconsistent with the regulation for a high fire test. It is utterly impracticable to make scientific tests by which the luminosity of merchantable oil can be determined, and this fact is made apparent in this case by examining the regulations of the Department of Agriculture. They do not even attempt to touch the subject. There is not a single rule prescribed, and no standard set.

There is no reason for examining oil in order to find objectionable foreign substances. The evidence discloses the fact that illuminating oils are never adulterated. There are no articles known to commerce with which they can be adulterated. There never has been any complaint of oil on this account.

It appearing, therefore, that at present there being no danger of explosions from oil, and there being no rule by which its luminosity can be tested, and there being no foreign matter in merchantable illuminating oil, and no complaint ever having been made of the presence of any such matter in oil, the act in question was not passed, as it purports to have been, for inspection, and must have been passed for some other reason.

For the reasons thus imperfectly drawn to the attention of the Court, it is respectfully submitted that the property of this complainant should not be unlawfully taxed in order to defray in part the expense of operating the Government of the great State of North Carolina.

AYCOCK & WINSTON,
Solicitors for Complainant.

Raleigh, N. C.

EDWARDS & BROUGHTON PRINTING CO., RALEIGH, N. C.

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No. 141.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

~~No. 624.~~

The Red "C" Oil Manufacturing Company, Appellant,

versus

The Board of Agriculture of North Carolina, William A. Graham, H. C. Carter, et al.

BRIEF FOR DEFENDANT.

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OCTOBER TERM, 1909.

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The Red "C" Oil Manufacturing Company, Appellant,

versus

The Board of Agriculture of North Carolina, William A. Graham, H. C. Carter, et al.

BRIEF FOR DEFENDANT.

This is a suit in equity, brought by the Red "C" Oil Manufacturing Company against the Board of Agriculture of North Carolina for the purpose of restraining the defendant board from attempting to enforce the provisions of an act of the General Assembly of North Carolina, ratified the 8th day of March, 1909, entitled "An Act to Provide for the Inspection of Illuminating Oils and Fluids."

This act is assailed upon the ground that it is in violation of the Constitution of the United States and of the Constitution of North Carolina. An elaborate bill was filed, which was fully answered. Upon the filing of the bill, a restraining order was prayed for and allowed, and the case came on for hearing before Connor, Circuit Judge, for the purpose of determining whether the injunction should be continued. At this hearing complainant and defendant filed numerous affidavits covering every issue raised by the pleadings. There was a full argument, and upon consideration of the bill and answer, and the affidavits filed by the parties, the court reached the conclusion that the oil inspection act was not in contravention of either the Federal or the State Constitution, and dissolved the restraining order theretofore issued, and, finding that *no other relief was asked,* dismissed the bill.

ARGUMENT.

The bill filed by the complainant herein nets two serious contentions:

I.

That the North Carolina Oil Inspection Act is unconstitutional and void in that, under the guise of exercising a police power, the General Assembly of North Carolina is really attempting to impose a revenue tax upon interstate commerce.

II.

That the said inspection act is unconstitutional in that the General Assembly of North Carolina has attempted to delegate to the Board of Agriculture legislative powers.

Of these in their order:

Every act of the General Assembly is presumed to be constitutional. Every doubt must be solved in favor of the validity of an act of the Legislature, and it is the settled policy of the courts to refrain from declaring an act of the Legislature void unless the repugnance to the Constitution is clear, complete, and unmistakable.

Wilcox v. Gas Co., 212 U. S., 19.
Nichol v. Ames, 173 U. S., 509.
Sweet v. Retchell, 159 U. S., 280.
Knoxville v. Water Co., 212 U. S., 1.
State v. Williams, 146 N. C., 624.

The statute must be allowed to speak for itself. Its meaning must be gathered from its four corners, and the debates in the Legislature upon the bill can not be considered by the courts in interpreting its meaning.

U. S. v. Trans-Missouri Freight Assn., 166 U. S., 319.

The reason for the rule is lucidly stated by Mr. Justice Peckham, in the case just cited, as follows:

> "The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

The statute declares that the tax of one-half cent per gallon is levied "for the purpose of defraying expenses connected with the inspection, testing, and analyzing oils in this State." This declaration by the General Assembly will be accepted at par by the Court. The very genius of the Constitution, whose interpreter and guardian the courts are, requires the courts to rate the acts of the lawmaking power at their face value.

Therefore, the suggestion that, under the guise of doing one thing, the General Assembly is attempting to do another, will not be considered by this Court. The courts are not disposed, neither are they at liberty, to impute improper motives to the lawmaking power of the Government.

Black on Constitutional Law, sec. 41.
Atkinson, etc., Ry. Co. v. Matthews, 174 U. S., 96.
Florida, etc., Ry. Co. v. Reynolds, 183 U. S., 471.
Ellis v. U. S., 206 U. S., 246.
The Chinese Exclusion Case, 130 U. S., 581.

In Florida, etc., Ry. Co. v. Reynolds, *supra,* the Court says:

> "We must assume that the Legislature acts according to its judgment for the best interests of the State. A wrong intent can not be imputed to it."

In the Chinese Exclusion Case, *supra,* the Court says:

> "If the power mentioned is vested in Congress, any reflection upon its motives or the motives of any of its members in exercising it would be entirely uncalled for. This Court is not a censor of the morals of other departments of the Government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that Congress possesses the power to pass an act, our province ends with its construction and its application to cases as they are presented for determination."

Of course, what is said with respect to the acts of Congress applies with equal force to the acts of the General Assembly of a State.

All questions of motive and purpose being eliminated, we have left of the first proposition two contentions:

(1) That oil is not a proper subject of inspection.

(2) That the tax of one-half cent per gallon is so excessive upon its face as to be unconstitutional and void.

The contention with respect to oil is that illuminating oils are so universally known to be safe and free from adulteration that no act requiring their inspection can possibly promote the public safety or the public welfare, or protect the public from fraud or imposition.

The complainant seems to concede that if the act is intended in good faith to protect the public from danger or from being imposed upon, and is reasonably calculated to afford such protection, it is well within the police power of the State.

> Plumley v. Massachusetts, 155 U. S., 461.
> Schollenberger v. Pennsylvania, 171 U. S., 1.
> McClean v. Denver, etc., Ry., 203 U. S., 38.
> Asbell v. Kansas, 209 U. S., 257.
> Oil Co. v. Craine, 209 U. S., 211.
> Waters-Pierce Oil Co. v. Deselms, 212 U. S., 159.

In Schollenberger v. Pennsylvania, 171 U. S., 1, this Court says that a State has the power to prevent its citizens from

being cheated. Upon the question as to whether or not oil is a proper subject for inspection, we quote from the opinion of the learned judge who tried the case below:

> "Defendants say that while 'it is true that a part of the explosive product and by-products of crude petroleum are of greater commercial value than kerosene or other illuminating oil, they aver that there is enough explosive substance left in the oil to make it dangerous to life and property, and this is shown by the fact that the more progressive and intelligent States in the Union have, upon their statute-books, oil inspection laws similar to the law of North Carolina.'
>
> "Defendants read, in support of their contention, the affidavits of the State Oil Chemist and of Dr. Withers, the Professor of Chemistry at the State Agricultural and Mechanical College, who say that they have made a study of the subject and have had training and experience in analyzing and testing illuminating oils. They give it as their opinion and that of other eminent chemists, whose writings they quote, that the illuminating oil sold in the markets of this State is sometimes dangerous. Professor Withers says: 'Affiant has tested samples furnished by the State Oil Chemist from oils on sale in this State, and has found some which showed a flash point of less than 90 degrees F. by the Elliott closed cup, and less than 100 degrees F. by the Tagliable cup and the Foster cup. He is of the opinion that the use of such oil in lamps, for illuminating purposes, is dangerous and should not be permitted.' He is 'also of the opinion that the State Board of Agriculture should require the State Oil Chemist to make tests which will show the light-giving qualities of the illuminating oils in this State. These tests may be made by the use of the photometer. There are other tests which may be made which will indicate the light-giving power.' Professor Syme says that he has visited the States of Georgia, Tennessee, and Ohio, the Bureau of Combustibles of New York City, and Bureau of

> Chemistry of the United States Department of Agriculture at Washington, and has investigated the systems of oil inspection and standards in use in those places. That in the light of the information he has acquired by the study of illuminating oils, he has recommended to the Board of Agriculture the adoption of a flash test of not less than 100 degrees Fahrenheit made with the New York State Board of Health tester, commonly called the Elliott cup of the Standard Flash, for insuring the safety in the use of oils.' He also gives it as his opinion that the standard adopted by the board is as low as it should be in this climate. It appears from the affidavits and exhibits that in thirty-five States of the Union, including the State of Maryland, oil inspection laws are in force; that in almost, if not quite, all the countries of Europe and in Canada, New Zealand and Australia, and Japan, similar laws are in force."

Oil inspection laws have three times been before this Court, and none of them have been condemned.

> Patterson v. Kentucky, 97 U. S., 501.
> Oil Co. v. Craine, 209 U. S., 211.
> Waters-Pierce Oil Co. v. Deselms, 212 U. S., 159.

In Patterson v. Kentucky, speaking of the oil inspection law, this Court says:

> "It is in the best sense a mere police regulation deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite, or permanently burn at less than a prescribed temperature, are unsafe for illuminating purposes. Whether the policy thus pursued by the State is wise or unwise, it is not the province of the National authorities to determine. That belongs to each State in its own sense of duty and in view of the provisions of its own Constitution. Its action in those respects is beyond the corrective power of this Court."

In view of the decisions of this Court; in view of the facts recited in the opinion of the court below; in view of the opinions of oil expert chemists, and in view of the legislation of thirty-five States upon the subject, we submit that the contention that the inspection of illuminating oil is not a permissible exercise of the police power of the State finds its only support in the vigor of its asseveration.

(2) Is the inspection tax of one-half cent per gallon so excessive upon its face as to warrant the Court in declaring it unconstitutional and void?

It will be helpful to approach the consideration of this question in the light of the principle which must control it, which principle is clearly stated by Mr. Justice Day in Mexico *ex rel.* McClean v. Denver and R. G. Ry., 203 U. S., 38:

> "It is further urged that this law is invalid because it imposes an unreasonable fee for the inspection, which goes into the treasury of the sanitary board, and the allegations of the writ tend to show that an inspector might make a considerable sum in excess of a day's wages in the work of inspecting hides under the provisions of this act. The law being otherwise valid, the amount of the inspection fee is not a judicial question. It rests with the Legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law."

The charge of the bill upon this phase of the case is as follows:

> "Your complainant alleges and charges that the imposition upon it of a tax of one-half cent per gallon upon each gallon of oil shipped by it into the State, and the requirement that this complainant shall comply with the rules and regulations prescribed by the State Board of Agriculture for the

> shipment of oil into the State of North Carolina, are illegal, oppressive, and contrary to the spirit and letter of the Constitution of the United States; that the said tax is more than double the amount necessary for the inspection proposed under the statute and regulations, and the defendants estimate that they will be able to turn into the State Treasury annually, after paying all expenses, at least $20,000."

It will be observed that no facts are set forth in the bill showing that the tax is excessive, and it seems that the charge is based upon the alleged fact that the defendants estimate that they will be able to turn into the State Treasury $20,000 per year.

These allegations in the bill are met by a complete denial by the defendants, who say they have made no estimate at all.

The only reference to the amount of the tax in the affidavits filed by complainant is found in the affidavit of the president of the complainant company, who simply says:

> "That the present act, if enforced, and if as much oil is sold under said act as has heretofore been sold in the State, will produce an income of $52,000 per year, and that the inspection provided for under the rules and regulations of the Department of Agriculture will not necessitate the use of half this sum."

Discussing this affidavit, the Circuit Judge well says:

> "At best, this is but the opinion of the president. He does not say what quantity of oil was shipped into the State during the past year, nor does he undertake, as probably he could not, by anticipation, to say what the cost of inspection will be. There are many items of expense, as enumerated by the Court in the Patapsco Guano Case, the character and amount of which cannot be anticipated with any reasonable degree of certainty. It is due

> the Department of Agriculture to assume that a fair trial will be given, the result reported to the General Assembly, and, as said by the Chief Justice, if the charge is found excessive, it will be moderated."

Necessarily, in passing upon the good faith of the General Assembly we must look at the situation just as it appeared to it. It did not know the number of gallons of oil that would be sold under the provisions of the act. There were no available records showing the amount of illuminating oil consumed in the State during the previous year. It did know that illuminating oil was waging a losing fight with electricity; that the waters of the State—the "white coal"—were being utilized as never before; that hydro-electric companies were belting the State with their lines, and that whole towns and communities would change in a day from the use of oil to electricity.

The gross amount of the inspection taxes could not be definitely known. Equally uncertain was the expense account. The ten inspectors were to receive salaries not to exceed *$1,000 a year each and expenses.* What these expenses would be could not be accurately known. North Carolina is a State of magnificent distances. For instance, the inspector in the Tenth District has to cover thirteen counties, and travel 200 miles, to get from one end of his district to the other. His expense account would, in all probability, be as much as his salary.

Then oil chemists, experts in their profession, had to be employed, scientific apparatus purchased and installed, and a new division of the Agricultural Department, with all necessary clerks and office equipment; and the cost of these things was uncertain.

We have, then, the General Assembly, confronted with an uncertain income and an uncertain expense account. The one thing that was definitely known to the General Assembly

was that thirty-five States in the Union had oil inspection laws, and that the inspection taxes ranged from one-half cent to a cent and a half per gallon.

Can the General Assembly be charged with bad faith for adopting a tax as low as the lowest known to exist? The learned Circuit Judge in his opinion says:

> "It appears from an examination of the various oil inspection laws in force in the United States, that the charges for inspection vary from one-half to one and one-half cents per gallon, and that in States wherein population and other conditions are similar to those in this State, the charge is about the same as that fixed by the act."

All these facts and conditions bring the case at bar directly within the principles enunciated in the Patapsco Guano Case, 171 U. S., 354, where Mr. Chief Justice Fuller says:

> "Entertaining these views of the legislative intention, it does not appear to us that evidence tending to show that money collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of this act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the Legislature would moderate the charge. But treating the question whether the charge of twenty-five cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question, we are satisfied that, comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the Department in this connection, and so on, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected as to justify the imputation of bad faith and change the character of the act."

Upon the question of excessive fees, we also call the attention of the Court to that part of the opinion of the judge below found on page 70 of the record, where he says:

> "In Western Union Telegraph Co. v. New Hope, 187 U. S., 419, it appeared that the borough had imposed a license tax, to meet the expense of inspection and supervision, upon the poles and wires of the telephone, telegraph, and electric light companies. In an action to enforce the payment of the tax the company contended, as here, that the tax was so largely in excess of the cost of inspection and supervision as to show that such was not its real purpose, but that it was intended and had the effect of bringing revenue into the treasury. Upon appeal, Mr. Chief Justice Fuller said: 'It is conceded that the borough had the right, in the exercise of its police power, to impose a reasonable license fee upon telegraph poles within its limits, and that an ordinance imposing such fee is to be taken as *prima facie* reasonable.' In the discussion a number of decisions of the Supreme Court of Pennsylvania are cited, one in which it was conceded that the tax *was five times more than the cost of inspection.* The Chief Justice concludes: 'Concurring in these views, in general, we think it would be going much too far for us to decide that the test set up (the annual cost of inspection) by the plaintiff in error must be necessarily applied and the ordinance held void because of failure to meet it.' St. Louis v. Telegraph Co., 148 U. S., 92; 49 U. S., 465. The same principle, to test, was applied in McLean v. Denver and Rio Grande Ry. Co., *supra,* the Court saying: 'The facts shown do not bring the case within that class which holds that, under the guise of inspection, other and different purposes are to be subserved, thus rendering the legislation invalid.'"

The repeal of section 58 of the Revenue Law affords no support to the contention of the complainant. That the levy is called a tax signifies nothing. Whether the charge be for

revenue or for costs of inspection, it would be equally a tax. Every tax, no matter for what purposes it may be levied, is a burden—a necessary evil; and if the Legislature concluded that inasmuch as oil was to be burdened with an inspection tax it would be fair to relieve it of the burden imposed by section 58 of the Revenue Act, then this considerate action on the part of the Legislature ought not and can not be used to nullify the law. The Legislature had the right to smite both cheeks. That it was content to lay gentle hands on one ought not to make it guilty of an assault upon the Constitution.

Speaking to this same question, the court below, on page 72 of the record, says:

> "It is insisted that the passage of the act of March 9, 1909, suspending the tax imposed upon dealers in oil under section 58 of the Revenue Law, shows that the Legislature intended and expected the act to produce revenue. The recitals and preamble to that act throw but little light upon this question. It is manifest that the cost of inspection will greatly exceed the amount raised by section 58, estimated at $10,000. It is equally manifest that the Legislature expected the inspection tax to cover the cost of inspection; hence, the recital is entirely consistent with the declaration that the oil inspection law would yield a much larger sum than section 58 of the Revenue Law. It might well be that the Legislature did not deem it wise to impose a cumulative tax upon illuminating oil, especially in view of the elementary truth that the consumer pays the tax, and that, in consideration of the benefit secured to the people by an inspection of oil used by them, the State was willing to surrender a revenue collected under section 58. Whatever may have been in the legislative mind, the passage of the act of March 9th is far from conclusive evidence of a purpose to violate the Constitution, or act in bad faith in the passage of the oil inspection law, and it had no relevancy to the argument for any other purpose."

The complainant also urges that sections 5 and 6 of the Oil Inspection Act show a sinister purpose on the part of the General Assembly. The sections are as follows:

> "Section 5. The State Treasurer shall, on the first day of June and December of each year, turn into the general fund of the State all the moneys of the oil fund in his hands in excess of the amount drawn out by the Commissioner of Agriculture for expenses.
>
> "Section 6. The Commissioner of Agriculture shall include in his report to the General Assembly an account of the operations and expenses under this act."

We submit that there is nothing in these sections to indicate bad faith on the part of the General Assembly to one disposed to credit it with good faith. On the other hand, it is fair to assume that the General Assembly intended that in the enforcement of this act nothing should be "done in a corner." These sections enable all dealers in oil, the public, and the General Assembly to ascertain just what is being done under the provisions of the act. The General Assembly, in the act itself, furnished the complainant and all other oil companies with the means of ascertaining the facts, so that if it should turn out that the tax levied was in excess of what it should be, the oil companies, armed with these facts, could make a plea to the Legislature to moderate the charges. It could not be definitely known to a minute fraction what tax should be levied. Manifestly, it was impossible to levy a tax that would exactly balance the expense account, and the General Assembly doubtless acted upon the principle that it would be "better to have a little too much than not quite enough."

Surely, this could not be called bad faith. Speaking to this question, the court below says:

> "The fact that the statute directs that semi-annually the balance to the credit of the oil inspection

fund is to be turned into the general fund does not show that there will be any surplus. It does tend to show that the Legislature anticipated that there might be, but experience has demonstrated that an anticipated revenue surplus too frequently exists only in the legislative mind."

II.

The next proposition, and the one stressed by complainant in the court below, is that the inspection act is unconstitutional and void in that it attempts to delegate to the Board of Agriculture legislative powers.

In passing upon this contention we submit that the rule that all doubts should be solved in favor of the constitutionality of an act of the Legislature should be applied with peculiar emphasis. Here the statute itself is not questioned. It is conceded that the Legislature can do the very thing it has done, but the quarrel is that it has not done it in the right way. No right of life, liberty, or property guaranteed by the Constitution is in peril; the machinery alone is attacked. A process is not so sacred as a principle, and in such cases the courts should search microscopically for the doubt that saves the law.

The law is not an exact science; it is a development, a growth, and not a finished product. As human society becomes more complex, as business expands and new conditions arise and new forces are discovered, broader and more liberal interpretations of the organic law must be found, or else the high purposes of the Constitution will be defeated. The Constitution was made for man, and not man for the Constitution.

The Legislature of North Carolina has done many things. It has been charged with many sins of omission and commission, and it is interesting to note that not once in all our judicial history has this doctrine been invoked to protect any human right. The doctrine has its place in our theory of

government—a place universally recognized and here freely admitted—but it is not the center of hopes nor the source of fears.

Delegated power is not a monster. The history of this and every other republican form of government is a history of delegated powers. Ours is not a pure, but a representative, democracy. No mass-meeting ever could or ever can enact a law in these United States. Ours is a representative form of government; not of direct, but of delegated, powers. Hence, it is not surprising that our Legislatures have immemorially delegated powers to officers, departments, municipalities—powers not strictly legislative, but which the Legislature could exercise itself or delegate to another, as in its judgment seemed best for the public weal. The most enlightened and efficient governments on this earth are those in which the largest amount of discretion is vested in the constitutional departments of the Government; and the highly technical plea of the complainant in this case is counter to the most advanced thought of the times. In the text of the American and English Encyclopædia of Law, vol. 6, page 1021, it is said:

> "It is a doctrine frequently reiterated by the courts that the functions of the Legislature must be exercised by it alone, and can not be delegated. This, however, is true only in a qualified sense, and the qualifications are rapidly becoming larger. A marked tendency appears in the direction of assigning duties heretofore deemed legislative to other bodies: to boards and commissions, to local authorities, and especially to the voters."

In Buttfield v. Stranahan, 192 U. S., 532, in a brief filed by Solicitor-General Hoyt, it is said:

> "Recent decisions of this Court recognize that to rigidly enforce the doctrine that Congress can not delegate legislative power would often in effect be a restriction upon legislative power, and they allow to Congress very wide latitude in this respect."

And further on:

> "The number of instances to be found in our laws where a wide discretion is left to an executive officer is necessarily very great."

In Locke's Appeal, 13 Am. Rep., page 720, it is said:

> "The Constitution grants the power to legislate, but it does not confer knowledge. The very trust implies that the power should be exercised wisely and judicially."

And this case has been frequently cited with high commendation by the Supreme Court of the United States.

In Wayman v. Southard, 10 Wheat., Chief Justice Marshall, delivering the unanimous judgment of the Court, said that although Congress could not delegate to the courts, or to any other tribunal, powers strictly and exclusively legislative, and although the line had not been exactly drawn that separates the important subjects that must be entirely regulated by the Legislature itself from those of less interest in which a general provision may be made and powers given to those who are to act under such general provisions to fill up the details, yet Congress may certainly delegate to others powers which the Legislature may rightly exercise itself.

Dean Mordecai, of Trinity, says:

> "The man has not yet been born of woman who can run and mark with mathematical precision the line between law and luck."

Be that as it may, it is absolutely certain that the line between powers strictly and exclusively legislative and those which are merely administrative is vague and shadowy; and the undoubted tendency, born of the necessities of the times, is to place all doubtful powers on the administrative side of the line.

These are some general principles which ought to be remembered in the consideration of all cases of this kind. But

we submit with great confidence that in the oil inspection act there is no delegation of legislative powers. We do not have to rely at all upon the doubt to which the Legislature is entitled. The great weight of the authorities, the big preponderance of the argument, are in favor of the constitutionality of the act. The Legislature did all it could do safely and sanely. It enacted that hereafter all the illuminating oils in North Carolina should be safe, pure, and furnish a satisfactory light. It then wisely left it to the Board of Agriculture to ascertain, by scientific investigations, what oils will measure up to these standards fixed by the Legislature. If the Legislature had proceeded with less thought; if it had proposed to blindly and arbitrarily fix a chemical standard about which it was sublimely ignorant, this complainant and all the other oil companies would have filed a strenuous protest. It is here seriously asserted that the Constitution has been violated because the Legislature refrained from passing on an essentially expert scientific question. The General Assembly of 1909 has been praised and condemned for acting with care. It has been praised and condemned for refusing to walk where it could not see and to speak when it did not know. Is such a Legislature unconstitutional? The Legislature did everything that was essentially and exclusively of a legislative character. It enacted the law that there should be inspection; that there should be safe oil; that there should be pure oil; that there should be oil that would give a satisfactory light. The expert scientific questions it wisely left to be ascertained by the board. It is a maxim that the law does not require a man to do a vain thing; it is equally true that the Constitution does not require a Legislature to do a foolish thing. All the recent cases and the entire trend of the judicial thought of the times support the action of the Legislature. In Locke's Appeal, *supra*, the Court says:

> "The Legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of Government."

And, further, the Court says:

> "The courts exercise power dependent on their own discretion. Take the case of granting a license to keep an inn and sell liquor. The judge determines whether the license is necessary, and, if not necessary, the law says to the complainant, 'No license.' The law takes effect just as the judge determines; yet who says it is the court that legislates?"

The opinion in this case has been cited and approved by the Supreme Court of the United States in every case before it involving the question of delegated powers.

In Isenhour v. The State, 157 Indiana, 517, it is held:

> "A provision of a pure-food law, that within ninety days after its passage the State Board of Health shall adopt measures to facilitate its enforcement and to *prepare rules regulating standards, defining adulterations,* and declaring methods of collecting and examining foods and drugs, is not a delegation of legislative power."

In St. Louis Railway Co. v. Taylor, 210 U. S., 281, it is held:

> "Legislative power is not unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of the safety-appliance act, that after a day named only cars with drawbars of uniform height shall be used in interstate commerce, and that the *standard shall be fixed by the association and declared by the commission.*"

The case of Buttfield v. Stranahan, 192 U. S., 492, is on all-fours with the case at bar, and upon reason and authority should settle this controversy.

The act of Congress under consideration in that case provided:

> "Following after May 1, 1897, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise, as tea, which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act."

Section 3 provides:

> *"The Secretary of the Treasury, upon the recommendation of said board (of tea experts) shall fix and establish uniform standards of purity, quality, and fitness for consumption* for all kinds of teas imported into the United States. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards, shall be deemed within the prohibition of the first section hereof."

An undivided Court held that the power granted to the Secretary of the Treasury to establish standards was not legislative in its character. If there is any difference in the power conferred to determine *tea that is fit to drink* and *oil that is fit to burn,* it is a difference that "passeth all understanding."

In the Union Bridge Co. v. United States, 204 U. S. (most of the cases bearing on this question are reviewed by Mr. Justice Harlan), it is said:

> "Of the statute in question Congress declared that navigation should be freed from unreasonable obstructions. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule.

> In performing that duty the Secretary of War will not, in any true sense, exert legislative or judicial power. If the principle for which the defendant contends receives our approval, the conclusion could not be avoided that executive officers in all departments have, from the foundation of the National Government, exercised and are now exercising powers as to mere details that are strictly legislative or judicial in their nature. Indeed, it is not too much to say that a denial to Congress of the right under the Constitution to delegate the power to determine some fact or the state of things upon which the enforcement of its enactments depends would be to stop the wheels of Government and bring about confusion, if not paralysis, in the conduct of the public business."

And what is here so forcefully said with respect to the National Government is equally true of the State Government. There is not a single department in the State that is not vested with more legislative power, if such it be called, than the inspection act confers upon the Department of Agriculture, a department organized in obedience to an express mandate of the Constitution. And if the rule insisted upon by complainant should be rigidly, logically, and impartially applied, the business of the State could not be carried on for an hour.

With reference to the standard fixed by the Legislature, the attention of the Court is directed to the language of the statute. Section 1 provides:

> "All kerosene or other illuminating oils sold or offered for sale in this State for illuminating purposes shall be subject to inspection and tests to determine the safety and value for illuminating purposes. . . . The Board of Agriculture is authorized to make all rules and regulations for the inspection of such oils, and to adopt standards as to safety, purity, or absence from objectionable substances and luminosity that are in any conflict with

> the provisions of this act, and which they may deem necessary to provide the people of the State with satisfactory illuminating oil."

Section 7 provides for analyzing oils upon complaint, and says:

> "If such analysis or other tests shall show that the oil is either unsafe or of inferior illuminating quality, its sale shall be forbidden and the report of the result or results be sent to the party making the complaint and to the manufacturers of said oil."

These are the only sections which refer to the standard, and, construed together, they limit and prescribe a standard of safety and purity, and under the very terms of the statute the board can exclude and condemn only such oils as are found upon analysis and test to be unsafe or of inferior illuminating quality.

This question has been so thoroughly considered, and the authorities so exhaustively reviewed, in the recent case of U. S. v. Grimaud, 220 U. S., 506, that any attempt to further review them in this brief would be unprofitable.

We may add that this phase of the case does not present a Federal question, but the Court having jurisdiction of the case, by reason of diversity of citizenship, will, of course, determine every issue raised by the pleadings. But, as the question involves a construction of the Constitution of the State of North Carolina, we deem it not improper to say that the learned Circuit Judge who tried the case below had just resigned his office as Associate Justice of the Supreme Court of North Carolina, is the author of a treatise on the Constitution of North Carolina, and his opinion on any question involving the construction of that instrument is entitled to peculiar weight.

III.

We assume that the first assignment of error will not be seriously urged in this Court. It appears from the record

that the bill herein was filed, and the only relief sought in the bill was an injunction against the defendant board upon the ground of the unconstitutionality of the statute. A temporary restraining order was granted. Thereafter both the complainant and the defendants filed numerous affidavits and prepared for the hearing on August 2d, and the court, in its judgment, recites:

> "This cause coming on to be heard upon a motion for an injunction against the defendants, as prayed for in the bill, and being heard upon the bill and answer, and affidavits in behalf of both complainant and defendants, and being argued by counsel for the parties, it is now considered and decreed by the court that, for the reasons set forth in the opinion herein filed, the complainant is not entitled to the injunction prayed for, and thereupon it is ordered, adjudged, and decreed that the restraining order heretofore granted be vacated, the injunction prayed for be refused, and, no other relief being asked, that the bill be dismissed at the cost of the complainant, and that the defendants recover of the complainant and the surety on its prosecution bond all costs and damages incurred by them in this suit, the same to be found and fixed by the clerk."

It was never suggested at the hearing by complainant that it desired any opportunity to offer any further proof. The case was tried to a finish upon the bill, answer, and affidavits, and the hearing was in every respect a final hearing.

Even if the hearing should not be considered as technically a final hearing, it is held that where all the rights of the parties could be determined on a motion for a preliminary injunction, the court has the power to enter a final decree on such a hearing.

> Alleghany Oil Co. v. Snyder, 106 Fed., 764, citing Mast Fous & Co. v. Stover Mfg. Co., 177 U. S., 485. See, also, Street's Fed. Eq. Practice, vol. 3, sec. 2322.

We call the attention of the Court, before closing this brief, to the language of the Oil Inspection Act, which is as follows:

> "All kerosene or other illuminating oils *sold or offered for sale in this State* for illuminating purposes shall be subject to inspection and test to determine the safety and value for illuminating purposes."

Manifestly, under the terms of this act oil can be sold and delivered to the consumer in the course of interstate commerce and be subject to neither inspection nor a tax. Wherein does any law which reaches only oil sold or offered for sale within the State of North Carolina affect commerce between the States?

Pabst Brewing Co. v. Crenshaw, 198 U. S., 17.

Respectfully submitted,

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